

# Kelo-Style Failings

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*This Article proposes a mechanism to internalize the risk to the public interest created by the process of land assembly utilized in conjunction with most eminent domain-related projects. The Article explains how the traditional bifurcated process of land assembly produces a schism between the land assembler's acquisition of title and the ability of the land assembler to make a productive use of the acquired property. The gap of time between title acquisition and use permits a change of circumstances to thwart the completion of a redevelopment project, which leaves the public to incur the costs of post-litigation waste. To internalize the externalities generated by the typical land assembly process, the Article proposes that land assemblers and condemning authorities hold title to properties in a land preservation trust until title to all necessary parcels has been acquired. The flexibility of a trust shields the public, land assemblers, and property owners from objective and subjective costs stemming from assembling land in the shadow of eminent domain. By preserving the properties, the trust not only becomes a proxy for the public utility of redevelopment projects, but also tips the balance of the public-private process of land assembly toward equipoise.*

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## I. INTRODUCTION

Summer 2011 marked the six-year anniversary of one of the most controversial Supreme Court decisions from the “Aughts,”<sup>1</sup> the “iDecade,”<sup>2</sup> or

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<sup>1</sup> Michael S. Rosenwald, *A Decade Is Slipping Away Without Leaving Its Name: The Aughts? The Ohs? Ugh. Lexicographers Are at a Loss for Words*, WASH. POST, Dec. 26, 2009, at C1.

<sup>2</sup> Arik Hesseldahl, *Apple's iDecade*, BLOOMBERG BUS. WEEK (Dec. 31, 2009, 11:27 PM), [http://www.businessweek.com/technology/content/dec2009/tc20091231\\_183323.htm](http://www.businessweek.com/technology/content/dec2009/tc20091231_183323.htm).

whatever moniker is affixed to the first decade of the twenty-first century—*Kelo v. City of New London*.<sup>3</sup> Following the Court's holding that economic development satisfied the Public Use Clause of the Fifth Amendment,<sup>4</sup> eminent domain became the legal issue du jour in academic and political circles. Property scholars pored over the decision to produce a hefty volume of articles.<sup>5</sup> Legislatively, twenty-eight states passed bills that curbed the risk of *Kelo*-style takings during 2006 alone.<sup>6</sup> Furthermore, voters in ten states approved ballot measures that limited the availability of eminent domain as a means of land assembly during the 2006 election season.<sup>7</sup> Even now, six years after the decision, state legislators from coast to coast are set to grapple with agendas that include eminent domain reform and an eminent domain measure is already slated to appear on Mississippi ballots in November 2011.<sup>8</sup> Regardless of the

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<sup>3</sup> *Kelo v. City of New London*, 545 U.S. 469 (2005). This is not intended to suggest that *Kelo* is the most controversial Supreme Court decision of the last decade. Other controversial decisions issued by the Court during the period from 2000 to 2010 include *District of Columbia v. Heller*, 554 U.S. 570 (2008) (striking down the District of Columbia's ban on handguns in private homes on Second Amendment grounds), *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that the state's ban on sodomy violated an individual's liberty interest protected by substantive due process of the Fourteenth Amendment), *Bush v. Gore*, 531 U.S. 98 (2000) (ruling that the procedure implemented by Florida to recount votes in the contested presidential election violated the Equal Protection Clause of the Fourteenth Amendment).

<sup>4</sup> *Kelo*, 545 U.S. at 484.

<sup>5</sup> For an extensive list of articles that address eminent domain post-*Kelo*, see DAVID L. CALLIES, PUBLIC USE AND PUBLIC PURPOSE AFTER *KELO V. CITY OF NEW LONDON* 75 app. C (2008).

<sup>6</sup> John M. Broder, *States Curbing Right to Seize Private Homes*, N.Y. TIMES, Feb. 21, 2006, at A1 (stating that state legislators banded together "in a rare display of unanimity" to support eminent domain reform in a manner "that cut[] across partisan and geographic lines"). For the number of bills enacted after the holding in *Kelo*, see *Eminent Domain: 2006 Legislation*, NAT'L CONF. ST. LEGISLATURES (Nov. 12, 2006), <http://www.ncsl.org/default.aspx?tabid=17593>.

<sup>7</sup> *Property Rights Issues on the 2006 Ballot*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/?Tabid=17595> (last visited Nov. 3, 2011).

<sup>8</sup> See, e.g., *Callegari Files Legislation to Restrict Tax Increases, Eminent Domain*, KATY TIMES (Nov. 15, 2010, 12:00 AM), <http://www.katytimes.com/articles/2010/11/17/news/doc4ce152586d0d1065865359.txt>; *Government Accountability: Protecting Private Property from Eminent Domain Abuse*, ATT'Y GEN. WASH., [http://www.atg.wa.gov/uploadedFiles/Home/Office\\_Initiatives/Legislative\\_Agenda/2010/Eminent\\_Domain\\_Abuse.pdf](http://www.atg.wa.gov/uploadedFiles/Home/Office_Initiatives/Legislative_Agenda/2010/Eminent_Domain_Abuse.pdf) (last visited Nov. 3, 2011) [hereinafter *Wa. AG, Eminent Domain Abuse*]; *House Bill 8 Information/History*, N.C. GEN. ASSEMBLY, <http://www.ncga.state.nc.us/gascripts/BillLookUp/BillLookUp.pl?Session=2011 &BillID=H8> (last visited Nov. 3, 2011). Furthermore, voters have recently decided ballot measures in other states. See, e.g., Phil West, *Mississippi Governor to Veto Eminent Domain Legislation*, COM. APPEAL (Memphis), Mar. 24, 2009, at B3; *Eminent Domain 2008 Ballot Measures*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/?TabId=13244> (last visited Nov. 3, 2011) (describing California's Proposition 99); Matt Gouras, *House Gives First Approval to Eminent Domain*, INDEP. REC. (Feb. 5, 2011, 12:00 AM), [http://helenair.com/news/article\\_71a660a6-30f1-11e0-a756-001cc4c002e0.html](http://helenair.com/news/article_71a660a6-30f1-11e0-a756-001cc4c002e0.html); Doug McMurdo, *Voters Reject Changing Judge Selection*,

form of reform, *Kelo* stamped its footprint on the law of eminent domain in almost every jurisdiction in the country.

Lost amid the post-*Kelo* maelstrom, the ruling has a more visible legacy in the city of New London, Connecticut. The ninety acres of land acquired by New London, including the Fort Trumbull neighborhood once located at the epicenter of *Kelo*, remain entirely undeveloped almost six years after the Court's decision.<sup>9</sup> The project floundered because the developer chosen by the New London Development Corporation failed to secure financing for the project.<sup>10</sup> As a result, the "urban village"<sup>11</sup> envisioned by New London's redevelopment plan that was supposed to include a hotel, health club, high-end condominiums, and office space never materialized.<sup>12</sup> According to one report, "[b]arren weed fields are all that exist where homes once stood."<sup>13</sup> Ingeniously, one op-ed invoked Joni Mitchell to describe the whole affair: "they take paradise and put up an empty lot."<sup>14</sup> To make matters worse, Pfizer Inc., widely viewed as the primary beneficiary of New London's exercise of eminent domain,<sup>15</sup> announced in late 2009 that it intended to vacate its New London facility.<sup>16</sup> Once Pfizer leaves, New London will have an additional abandoned building to add to the "empty lot" of overgrown weeds as a memorial to the

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LAS VEGAS REV.-J. (Nov. 3, 2010, 12:00 AM), <http://www.lvrj.com/news/voters-reject-changing-judge-selection-106597233.html>.

<sup>9</sup> See Jeff Benedict, *Taken in Vain: With Pfizer Leaving, City Has Nothing but Weedy Acres to Show for Grandiose Development Scheme that Uprooted Homeowners and Razed a Neighborhood*, HARTFORD COURANT, Nov. 15, 2009, at C1; see also Jeff Benedict, *Apology Adds an Epilogue to Kelo Case* (Sept. 18, 2011), [http://articles.courant.com/2011-09-18/news/hc-op-justice-palmer-apology-20110918\\_1\\_epilogue-justice-palmer-s-susette-kelo](http://articles.courant.com/2011-09-18/news/hc-op-justice-palmer-apology-20110918_1_epilogue-justice-palmer-s-susette-kelo) (recently, one of the justices of the Connecticut Supreme Court apologized to Susette Kelo and stated that he would have voted differently if he had known about the future failure to develop the site, which he could not have known at the time).

<sup>10</sup> Kathleen Edgecomb, *NLDC Considering Proposal for Townhouse Project at Fort Trumbull*, THE DAY (New London), Feb. 10, 2010, at A3 ("Corcoran Jennison lost its preferred-developer status after failing to meet a deadline to secure financing for the residential component of the plan. The developer blamed the faltering economy for its difficulties."); William Yardley, *After Eminent Domain Victory, Disputed Project Goes Nowhere*, N.Y. TIMES, Nov. 21, 2005, at A1 ("One point of contention: Corcoran Jennison is resisting pressure from the city to build a waterfront hotel first, as was initially planned, out of concern that there is no market for one.").

<sup>11</sup> Editorial, *A Redevelopment Sand Castle: On the Aftermath of a Supreme Court Ruling*, S.F. CHRON., Nov. 28, 2009, at A11.

<sup>12</sup> See Edgecomb, *supra* note 10; Yardley, *supra* note 10.

<sup>13</sup> Benedict, *supra* note 9; see also Edgecomb, *supra* note 10; Patrick McGeehan, *Pfizer to Leave City that Won Land-Use Suit*, N.Y. TIMES, Nov. 13, 2009, at A1 (describing the property acquired via *Kelo* as a "swath of barren land that was cleared of dozens of homes to make room for a hotel, stores and condominiums that were never built"); Yardley, *supra* note 10.

<sup>14</sup> Editorial, *supra* note 11.

<sup>15</sup> See Eric Gershon, *Pfizer Inc. to Vacate New London R&D Center: Moving to Groton*, HARTFORD COURANT, Nov. 10, 2009, at A1; McGeehan, *supra* note 13.

<sup>16</sup> See, e.g., McGeehan, *supra* note 13.

Court's famous, or maybe infamous, decision to permit New London to take "paradise."

*Kelo*, however, is not the most recent example of a development project that utilized eminent domain as a means of land assembly that failed to get off of the ground, literally, after "public use" litigation. The facts of *Norwood v. Horney* bear a striking resemblance to those of *Kelo*: flagging local economy, a redevelopment plan involving the acquisition of private property by eminent domain for purposes of economic development, and litigation to determine the scope of public use.<sup>17</sup> *Norwood*, however, differs from *Kelo* in two crucial aspects. The *Norwood* plaintiffs chose to challenge the city's action under the public use clause of the Ohio Constitution rather than pursue a challenge under the federal Constitution.<sup>18</sup> More importantly, the homeowners in *Norwood* fared better than the *Kelo* plaintiffs—the *Norwood* plaintiffs won their claim.<sup>19</sup> In a decision issued almost one year to the day after *Kelo*, the Supreme Court of Ohio unanimously agreed that "economic or financial benefit alone" failed to satisfy the public use clause under Ohio's Constitution.<sup>20</sup> After losing *Kelo* by a vote of 5–4, property rights advocates championed the *Norwood* ruling as a "homerun for homeowners."<sup>21</sup>

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<sup>17</sup> *Norwood v. Horney*, 830 N.E.2d 381, 384 (Ohio Ct. App. 2005). At the time of the case, the city had a \$3.6 million deficit on its books and reduced bus and recreational services as cost-saving measures. See Merit Brief of Appellee Rookwood Partners, Ltd. at 6, *Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006) (Nos. 05-1210 & 05-1211); see also *Norwood v. Horney*, 853 N.E.2d 1115, 1124 (Ohio 2006) (The developer planned to construct over 200 residences and more than 500,000 square feet of office and retail space in Norwood, which was estimated to add \$2 million per year to city coffers.).

<sup>18</sup> *Norwood*, 853 N.E.2d at 1122–23. The relevant section of the Ohio Constitution is Section 19, Article I which states that:

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure, or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money, and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

OHIO CONST. art. I, § 19.

<sup>19</sup> *Norwood*, 853 N.E.2d at 1142–53 (holding that *Norwood*'s exercise of eminent domain for "economic benefit alone" violated the protection afforded private property owners under the Ohio Constitution).

<sup>20</sup> *Id.*

<sup>21</sup> Gregory Korte, *Norwood Loses Case on Property Seizures*, CIN. ENQUIRER, July 27, 2006, at A1 (quoting the Ohio Farm Bureau Federation). For further positive commentary, see, for example, Steve Kemme, *Norwood Site to Stay Vacant for Now*, CIN. ENQUIRER, July 29, 2006, at A1 (reporting that one of the attorneys in the case described the decision as "a complete vindication . . . of the rights of every home and business owner in the state").

Despite the legal victory for private property owners in Ohio, the proposed development site in Norwood looks eerily similar to that in New London—the properties have not been developed since the litigation ended almost five years ago.<sup>22</sup> Two years after the litigation, the developer reached a deal to purchase the properties owned by the victorious *Norwood* holdouts<sup>23</sup> and demolished the structures on those properties shortly thereafter.<sup>24</sup> However, the duration of the land assembly process proved too long for the prospective commercial tenants of the yet-to-be constructed buildings. As a result, the would-be tenants leased commercial property at a different location, which left the proposed development without any tenants for the buildings to be constructed on the site.<sup>25</sup> Ground has yet to be broken for development and the area has become nothing more than an expanse of “high grass and weeds.”<sup>26</sup> One local resident described the site as “horrible, absolutely horrible,” while another suggested that the city should “plant corn there and sell it” instead of letting the area lie fallow.<sup>27</sup> Given the present state of the properties at issue in *Norwood*, the Supreme Court of Ohio’s decision was not a “homerun for property owners,”<sup>28</sup> but more like a bloop single—a *Kelo*-style failing.<sup>29</sup>

The invisible, and ultimate, loser as a result of *Kelo*-style failings is the public. Unlike developers and property owners who obtain title to land or

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<sup>22</sup> See Steve Kemme, *Owner’s Legal Victory Leaves Land in Limbo*, CIN. ENQUIRER, July 22, 2008, at A1. Following the decision, several homeowners continued to holdout by refusing to sell their properties voluntarily to the developer. As a result, “a tall chain-link fence enclose[d] three forlorn homes like farm houses in . . . weeds.” Peter Bronson, *The Eminent Domain Superheroes of Norwood*, CIN. ENQUIRER, Aug. 8, 2006, at B7.

<sup>23</sup> Steve Kemme, *Eminent Domain Holdout Sells for \$1.25M*, CIN. ENQUIRER, Sept. 4, 2008, at A1.

<sup>24</sup> Laura Baverman, *Delayed Project to Start in Spring*, CIN. ENQUIRER, Nov. 3, 2009, at A1.

<sup>25</sup> Lisa Bernard-Kuhn, *Kenwood’s Comeback*, CIN. ENQUIRER, Dec. 16, 2007, at E1 (“[T]roubles surfaced for the planned Rookwood expansion and legal battles ensued over Norwood’s use of eminent domain to secure neighboring homes and commercial properties for the development. Last year, the Ohio Supreme Court sided with home owners, and today the site houses two vacant houses surrounded by chain-linked fencing. ‘Had the Rookwood scenario gone the other way, maybe you would have seen some other things happen there rather than at Kenwood,’ said Rob Molloy, Sycamore Township administrator. ‘Crate & Barrel is a prime example. We heard several times that it was going to be at Rookwood, but it ended up here.’”); Cliff Peale, *Crate & Barrel Heads to Kenwood*, CIN. ENQUIRER, Nov. 30, 2006, at A1 (“Crate & Barrel had long been rumored to be headed to a new Rookwood development in Norwood, but that site was delayed by legal wrangling over the city’s right to take the site by eminent domain.”).

<sup>26</sup> Kemme, *supra* note 23.

<sup>27</sup> Kemme, *supra* note 22.

<sup>28</sup> *Id.*

<sup>29</sup> According to newspaper accounts, the developer announced plans to initiate building in Spring 2010. As of this writing, however, no construction has begun and no soil has been turned. See Baverman, *supra* note 24.

money,<sup>30</sup> the public receives nothing after the legal process has run its course and the land necessary for development has been assembled. Instead, the public is left with an empty patch of land that not only threatens to reduce tax revenue of taken as well as neighboring plots of land, but also drains a valuable stream of commerce as residents pack up and move elsewhere.<sup>31</sup> Beyond the financial costs to the public, the ruin created by the cycle of negotiation, acquisition, and destruction without subsequent development serves as a visible blot on the public consciousness. Consequently, a regrettable irony exists—the public in whose name the development project that invoked eminent domain was initiated receives nothing as a result of the takings.

Although its sheer volume is eye-catching, the overwhelming majority of post-*Kelo* legislation fails to protect the public from suffering the ill-effects of *Kelo*-style failings. As a general matter, most post-*Kelo* reforms represent a full frontal assault on *Kelo* by excluding economic development or post-acquisition transfer of property to private parties from the definition of public use.<sup>32</sup> Narrowing the definition of public use, however, does not inoculate the public against *Kelo*-style failings because many states retained exceptions from the newly minted restrictions if eminent domain is used to eradicate “blight.”<sup>33</sup> The shortcoming of such reforms is that a precise definition of blight cannot be crafted to lessen the risk to which the public is exposed. For example, Pennsylvania’s pre-*Kelo* definition of blight included property that was “unsafe,” “unsanitary,” plagued by “defective design,” or suffering from a “lack of proper light and air and open space.”<sup>34</sup> After *Kelo*, Pennsylvania “improved”

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<sup>30</sup> This is not intended to diminish the hardship suffered by some property owners forced to relocate as a result of eminent domain. Rather, the statement merely reflects that such homeowners receive something in exchange for their properties even if it is not the equivalent of what has been lost.

<sup>31</sup> Nicole Stelle Garnett, *The Public Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 955 (2003).

<sup>32</sup> See, e.g., FLA. CONST. art. X, § 6(c) (“Private property taken by eminent domain pursuant to a petition to initiate condemnation proceedings filed on or after January 2, 2007, may not be conveyed to a natural person or private entity except as provided by general law passed by a three-fifths vote of the membership of each house of the Legislature.”); MICH. CONST. art. X, § 2 (“‘Public use’ does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues.”); N.H. CONST. art. 12-a (“No part of a person’s property shall be taken by eminent domain and transferred, directly or indirectly, to another person if the taking is for the purpose of private development or other private use of the property.”); S.C. CONST. art. I, § 13(A) (“Private property must not be condemned by eminent domain for any purpose or benefit including, but not limited to, the purpose or benefit of economic development, unless the condemnation is for public use.”). For a definitional modification, see, for example, KY. REV. STAT. ANN. § 416.675(2) (West 2005 & Supp. 2007).

<sup>33</sup> Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2120–31 (2009). For a history of the relationship between blight and eminent domain, see Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1 (2003).

<sup>34</sup> 35 PA. CONST. STAT. ANN. § 1702(a) (West 2011).

its definition by adding factors such as “vermin infested” or a “haven for rodents” to the list of qualities that identify “blighted property.”<sup>35</sup> Such malleable characteristics cannot be cabined to distinguish blighted from non-blighted property; no meaningful distinction exists between a “haven for rodents” and a locale that is just casually popular among rodents. In short, the ambiguous definition of blight casts considerable doubt on the utility of public use reforms.<sup>36</sup>

The speed with which legislatures enacted post-*Kelo* reforms is not surprising given the popular backlash against the decision—and the failure to enact more stringent post-*Kelo* reforms is not surprising either. In an age where political decisions are made by reference to public opinion polls, politicians could not ignore the nearly unanimous condemnation of the decision reflected in poll after poll. Local governments around the country, however, counterbalanced public rancor by opposing muscular eminent domain reforms.<sup>37</sup> As public choice theory would predict, a Solomon-like compromise resulted from the tug-of-war between these interests.<sup>38</sup> Politicians passed reforms aimed precisely at *Kelo*-style takings, which quelled the public clamor for change, but the reforms also provided an escape hatch by leaving blight as a permissible foundation to exercise eminent domain.<sup>39</sup> Notably, the takings in *Kelo* were not premised on the blight of the properties, which kept the blight

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<sup>35</sup> 26 *id.* § 205(b)(1)–(12).

<sup>36</sup> Timothy Sandefur, *The “Backlash” So Far: Will Citizens Get Meaningful Eminent Domain Reform?*, 2006 MICH. ST. L. REV. 709, 725 (stating that “[d]efinitions of ‘blight’ are generally vague enough to allow condemnation of almost any property”); Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. 183, 266 (2007) (commenting that “[a] sufficiently expansive definition of blight is essentially equivalent to authorizing economic development takings”). Despite the apparent protection offered to property owners on the face of the statutes, some of the new laws included qualifying language that diminished the strength of the reform. Texas, for example, prohibited condemnations for “economic development purposes, unless the economic development is a secondary purpose resulting from municipal community development.” See TEX. GOV’T CODE ANN. § 2206.001(b)(3) (West 2008). Distinguishing between a primary and “secondary” purpose of eminent domain is an exercise in semantics. See also, e.g., W. VA. CODE ANN. § 54-1-2(a)(ii) (Lexis 2010) (barring the exercise of eminent domain “primarily for economic development”). Among the most comprehensive post-*Kelo* statutory protections are those created in Florida and New Mexico. The post-*Kelo* reforms in those states not only bar eminent domain for purposes of economic development, but also ban its use to eradicate blight. See Act of May 11, 2006, ch. 2006-11, 2006 Fla. Laws 214; Act of Apr. 2, 2007, ch. 330, 2007 N.M. Laws 3873.

<sup>37</sup> See, e.g., Dan Walters, *Eminent Domain Bills Are Stalled—Except One for Casino Tribe*, SACRAMENTO BEE, Sept. 16, 2005, at A3 (describing efforts to block eminent domain reform in California); Carrie Weimar, *Crimping Eminent Domain*, ST. PETERSBURG TIMES, Nov. 13, 2006, at B1 (containing comments regarding the utility of limiting eminent domain as a tool for development).

<sup>38</sup> Alberto B. Lopez, *Revisiting Kelo and Eminent Domain’s “Summer of Scrutiny,”* 59 ALA. L. REV. 561, 595–600 (2008).

<sup>39</sup> *Id.*

standard under the public's radar and permitted legislators to exempt blight from post-*Kelo* restrictions. Thus, each side could claim a victory of sorts and political attention could turn to the next legislative fire.<sup>40</sup>

If blight is a loophole in post-*Kelo* eminent domain reforms, then local governments should be expected to exploit that loophole by substituting blight takings for economic development takings. To that end, post-*Kelo* evidence of the usage of blight as a pretext for an economic development taking is readily available. Missouri, for example, modified its public use definition in 2006 by excluding economic development from the permissible uses for eminent domain, but retained an exception for the elimination of blight.<sup>41</sup> In 2007, Kansas City sought to redevelop an area by designating it as "blighted" even though some of the parcels within that area were not blighted.<sup>42</sup> Although the owner of the non-blighted property challenged the action in court, a Missouri appellate court upheld Kansas City's exercise of eminent domain.<sup>43</sup> Recently, several Wisconsin cities have sought to deploy eminent domain for purposes of blight elimination even though the underlying purpose of the takings is allegedly economic development.<sup>44</sup> Furthermore, a post-*Kelo* study of eminent domain in Washington concluded that its blight standard threatened to sweep just about any property into the eminent domain net.<sup>45</sup> Supporting its conclusion, the study detailed the usage of blight as a justification for eminent domain "with the idea of tearing down the homes and transferring the property to developers to build 'urban villages.'"<sup>46</sup> Ironically, New London also promoted its now-defunct development plan by describing the end product as an urban village.

Recognizing the risk carved out by the blight loophole, a number of state legislatures planned to visit or revisit the definition of blight during 2011. In fact, New Jersey's legislature considered, and rejected, an amendment to its definition of blight during the first month of 2011.<sup>47</sup> With almost as much

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<sup>40</sup> *Id.*

<sup>41</sup> See MO. REV. STAT. § 523.271 (2011).

<sup>42</sup> *Allright Props., Inc. v. Tax Increment Fin. Comm'n of Kan. City*, 240 S.W.3d 777, 778–79 (Mo. Ct. App. 2007).

<sup>43</sup> *Id.* at 782.

<sup>44</sup> See Nicholas Penzenstadler, *City Set To Take Family's Land*, MILWAUKEE J.-SENTINEL, June 10, 2009, at 1A. For a similar case from Wisconsin, see Sean Ryan, *Blight Declaration Could Wipe Out Oak Creek Farm*, DAILY REP. (Milwaukee), May 7, 2010, at 1A. Eventually, political pressure forced the local authorities to drop the plan of acquisition by eminent domain. See Mark Schaaf, *City Uproots Plan for Buying Farm*, OAK CREEK NOW, June 3, 2010, at 1.

<sup>45</sup> William R. Maurer, *A False Sense of Security: The Potential for Eminent Domain Abuse in Washington*, WASH. POL'Y CENTER, 6 (Dec. 2006), [http://www.washingtonpolicy.org/sites/default/files/Eminent%20Domain%20-%20False%20Sense%20of%20Security%20PB\\_0.pdf](http://www.washingtonpolicy.org/sites/default/files/Eminent%20Domain%20-%20False%20Sense%20of%20Security%20PB_0.pdf).

<sup>46</sup> *Id.* at 7–9.

<sup>47</sup> *Legislative Recap*, N.J. LEAGUE MUNICIPALITIES (Jan. 11, 2011), <http://www.njslom.org/letters/ml011111-leg-advisory.html>. For the text of the bill that failed



alacrity, a Wisconsin state senator announced that she plans to introduce a bill to refine the state's definition of blight in response to the attempted blight takings in her state.<sup>48</sup> If the proposal is enacted, Wisconsin's definition of blight will have changed twice in the six years since *Kelo*.<sup>49</sup> Given the findings in Washington, the Attorney General's Office asked state legislators to amend the definition of blight in the Community Renewal Law during the 2011 legislative session because it "allows [] and even encourages" local authorities to use eminent domain as a means to assemble land for private benefit.<sup>50</sup> But if these legislative changes track those made in *Kelo*'s wake, the end result will be nothing more than an additional group of factors that remain ambiguous enough to mask an economic development taking.

Assuming, for the sake of argument, that an area unquestionably falls within the definition of blight, exercising eminent domain to eradicate blight threatens the public interest in the same way as an economic development taking. For example, one of the most controversial projects employing eminent domain as a means of land assembly at present is Brooklyn, New York's Atlantic Yards project, a massive redevelopment project that includes an arena for the NBA's New Jersey Nets.<sup>51</sup> Condemning authorities justified the exercise of eminent domain by labeling the area to be acquired as blighted and that designation survived a legal challenge that made its way to the New York Court of Appeals.<sup>52</sup> Development, however, has not proceeded quickly and "[a] hole grows in Brooklyn" that represents "the beginnings of the failure of a massive government plan to revive the . . . neighborhood."<sup>53</sup> If circumstances emerge that impede construction, the redevelopment area will take on the appearance of the "holes" in New London or Norwood.<sup>54</sup>

This Article argues that the traditional process of land assembly generates externalities that threaten to produce post-litigation waste and proposes a mechanism to internalize those externalities. The next part of this Article explains how the traditional two-step process of land assembly creates a schism between transfer of title and productive use of the property that imperils the

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in New Jersey, S1451, see S. 1451, 214th Leg. (N.J. 2010), [http://www.njleg.state.nj.us/2010/Bills/S1500/1451\\_R2.pdf](http://www.njleg.state.nj.us/2010/Bills/S1500/1451_R2.pdf).

<sup>48</sup> Press Release, Mary Lazich, Lazich to Reform Eminent Domain, Blight Laws (Aug. 17, 2010), available at <http://legis.wisconsin.gov/senate/sen28/news/Press/2010/pr2010-034.asp>.

<sup>49</sup> *Id.*

<sup>50</sup> Wa. AG, *Eminent Domain Abuse*, *supra* note 8. The bills were introduced during the 2010 legislative session, but failed to obtain sufficient support to proceed through the legislative process. Despite the setback, the bills have been reintroduced during the 2011 legislative session.

<sup>51</sup> *Develop Don't Destroy (Brooklyn) v. Empire State Dev. Corp.*, No. 114631/09, 2010 WL 936220, at \*1 (N.Y. Sup. Ct. Mar. 10, 2010).

<sup>52</sup> *Id.* at \*8.

<sup>53</sup> Julia Vitullo-Martin, *A Hole Grows in Brooklyn*, WALL ST. J., Mar. 7, 2009, at A9.

<sup>54</sup> Presumably, property in Brooklyn will attract more developers interested in the property than the areas subject to redevelopment in New London and Norwood.

public interest. Part III of this Article evaluates two recent scholarly proposals that offer alternatives to traditional eminent domain land assembly—the land assembly district (LAD) and secret purchases of land within areas targeted for redevelopment. Because both are likely to utilize the bifurcated process of land assembly eventually, post-litigation waste remains a possibility. To internalize the costs of land assembly, Part IV proposes that land assemblers and condemning authorities hold title to acquired properties as co-trustees of a land preservation trust (LPT). This part of the Article argues that combining narrowly tailored co-trustee powers with the duties imposed upon co-trustees promotes the interests of the public, land assemblers, and property owners by maximizing the flexibility with which co-trustees may respond to changing circumstances. The Article concludes that the LPT's protection of the public interest not only serves as a proxy for the utility of redevelopment projects, but also tilts the scales of the public-private partnership model of land assembly toward equipoise.

## II. LAND ASSEMBLY AND THE RISK TO THE PUBLIC INTEREST

Property scholarship brims with analysis that examines the efficiency of transactions—the allocation of rights to parties that place the highest value on the things to which those rights attach.<sup>55</sup> In one of the most influential articles of the last fifty years, *The Problem of Social Cost*, Ronald Coase posited that resource allocation was independent of the assignment of legal entitlements in the absence of transaction costs.<sup>56</sup> In other words, bargaining parties distribute resources efficiently regardless of the assignment of legal rights if the costs of reaching an agreement are zero. To illustrate the point, Coase used a series of binary relationships to conclude that two parties could bargain around the law if transaction costs do not impede bargaining. Coase's examples included a cattle rancher and an owner of neighboring land, confectioner-adjacent doctor's office with a common wall, manufacturer and nearby business, and polluter-pollution sufferer.<sup>57</sup> Multiple individuals may be present on each side of the efficiency equation, but each side of that equation only has one interest group; the efficiency-promoting transaction is binary.<sup>58</sup>

The relationship between the binary paradigm and efficiency is reflected in an array of property doctrines.<sup>59</sup> To demonstrate that a given doctrine promotes

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<sup>55</sup> RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 11 (7th ed. 2007). This is not to say that efficiency is the only factor that influences the direction of property law. Fairness is also an important factor in many decisions.

<sup>56</sup> Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 1–8, 15 (1960).

<sup>57</sup> *Id.* at 2–15.

<sup>58</sup> See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* 40–81 (1991) (illuminating Coase's ideas in the real world by analyzing the binary relationship between cattle ranchers and farmers).

<sup>59</sup> For a general discussion of property and efficiency, see POSNER, *supra* note 55, at 31–92.

efficiency, analysis focuses on the immediate parties to the transaction and the immediate uses of the property made by each of the parties to the binary transaction. Adverse possession, for example, creates a new title in a trespasser if the trespasser makes a productive use of the land for a statutory period of time without being ejected by the true owner of the land.<sup>60</sup> Similarly, the law of waste prevents present possessors, such as legal life tenants, from using property in a way that depreciates the value of the future interests in the property.<sup>61</sup> Breaking the efficiency analysis into its components, adverse possession examines the relationship between owner-trespasser while the relationship between present possessor-holder of future interest is the focus of the law of waste. As a general matter, efficiency compares the wealth-maximizing uses of two parties and allocates property rights according to the party that will make the most productive use of the property.

Implicit in the binary transactions in both positive law and scholarship is that an efficient transaction between two bargaining parties promotes the interest of an invisible third party beneficiary—the public. Social welfare is maximized as a byproduct of efficient bargains struck by two parties. Adverse possession, for example, enhances public wealth by creating a new title to land in a trespasser who makes a more productive use of the property than the owner.<sup>62</sup> Coase's cattle ranchers and farmers may reach agreement despite legal entitlements, thereby distributing resources efficiently in the absence of bargaining costs.<sup>63</sup> The public benefit is tangential to the benefits accruing to the immediate parties to the transaction.

Like other areas of property law, efficiency stands at the heart of eminent domain.<sup>64</sup> Eminent domain provides a mechanism for land assembly when market transactions fail to aggregate title to property necessary for a given project.<sup>65</sup> Indeed, the market rarely succeeds in assembling title to all necessary

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<sup>60</sup> JESSE DUKEMINIER ET AL., PROPERTY 119 (7th ed. 2010).

<sup>61</sup> *Id.* at 217–18.

<sup>62</sup> *Id.* at 119.

<sup>63</sup> Coase, *supra* note 56, at 15 (referring to his transaction-free analysis as a “very unrealistic assumption”). Even Coase recognized that a world without transaction costs was a figment of the imagination.

<sup>64</sup> JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES 2 (Chicago, Callaghan & Co. 1888) (“Apart from constitutional considerations, it is not essential, in order to constitute an act of eminent domain, that the use for which the property is taken should be of a public nature. It is sufficient that the use of the particular property is necessary to enable individual proprietors to cultivate and improve their land to the best advantage or to develop certain natural and exceptional resources incident thereto . . . . In such cases the public welfare is promoted, though indirectly, by the increased prosperity which necessarily results from developing the natural resources of the country.”). For articles addressing eminent domain and efficiency, see generally Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 STAN. L. REV. 871 (2007); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986).

<sup>65</sup> *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 1203, 1231 (C.D. Cal. 2002) (asserting that eminent domain is employed to combat holdout

parcels of land because some property owners hold out by refusing to sell their properties. Part of the cost of holding out is not borne by holdout owners; it is externalized to the public.<sup>66</sup> Economic development takings, for example, are typically premised on the creation of jobs and increased tax revenues that improve social welfare. Holdouts delay the public's reception of these benefits. Similarly, the economic toll that blight takes on neighboring property owners and the community outweighs the right of the property owner to retain title to the land. In economic terms, eminent domain is the government's tool to reduce the externalities to which holdouts expose the public.

To minimize these externalities, eminent domain aggregates title to properties in areas designated for redevelopment using both voluntary and involuntary mechanisms. Prior to filing an eminent domain petition, private land assemblers attempt to acquire title by voluntary agreement with property owners in areas selected for acquisition and subsequent development. Once voluntary negotiations have reached a stalemate, the condemning authority enters the land assembly process to acquire title to holdout properties via eminent domain. The land assembly process in *Norwood* is an exemplar of the standard land assembly script—land assembler secures title to some, but not all, properties, and the government, or its agent with the delegated power of eminent domain, subsequently intervenes, seeking to acquire title to holdout properties by eminent domain.<sup>67</sup>

Condemning authorities prefer this two-step approach to land assembly because the voluntary phase of acquisition avoids public assumption of costs associated with obtaining title to numerous parcels of land by eminent domain.<sup>68</sup> This preference for voluntary acquisition is codified in most states in

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problems associated with land assembly); Richard A. Epstein, *Holdouts, Externalities, and the Single Owners: One More Salute to Ronald Coase*, 36 J.L. & ECON. 553, 572 (1993) (noting that eminent domain is "typically" used when holdouts prevent the assembly of land necessary for projects); Thomas W. Merrill, *Rent Seeking and the Compensation Principle*, 80 NW. U. L. REV. 1561, 1570 (1986) (reviewing RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985)) (observing that eminent domain has been used "to promote efficient allocation of resources by overcoming holdouts and free riders").

<sup>66</sup> For a definition of an externality, see, for example, RONALD H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 24 (1988) ("An externality is . . . defined as the effect of one person's decision on someone who is not a party to that decision.").

<sup>67</sup> *Norwood v. Horney*, 830 N.E.2d 381, 385 (Ohio Ct. App. 2005) ("Early on, Rookwood repeatedly pressed Norwood to invoke its eminent-domain powers, but each request was denied. Alternatively, Norwood urged Rookwood to privately acquire the renewal area without legislative intervention. Norwood was so adamant that the city required Rookwood to document its acquisition efforts. But the owners remained recalcitrant, rebuffing Rookwood's purchase offers.").

<sup>68</sup> Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 605 (2005) (commenting that "the government will often choose to secure consensual agreement over going to court" because of the expense of litigation); Merrill, *supra* note 64, at 80 (stating that "when governments acquire interests in land they prefer, if possible, to do

statutes that require condemning authorities or their delegates to attempt to purchase the property by negotiation before seeking acquisition by eminent domain.<sup>69</sup> The Uniform Relocation Assistance and Real Property Acquisition Act, for example, requires pre-condemnation negotiations to occur before the onset of litigation.<sup>70</sup> The principal justification for statutes that require pre-eminent domain negotiations between purchaser and property owner is that voluntary transfers avoid litigation.<sup>71</sup> Construing its negotiation statute in 1865, which required “a fair and honest attempt” at agreement, the Supreme Court of California asserted that the purpose of pre-litigation negotiation was “to prevent a waste of money by needless litigation.”<sup>72</sup> In short, private transfers are preferred because they conserve not only public, but also judicial, resources.

But if pre-condemnation transfers are efficient transactions between the parties and eminent domain promotes the efficient allocation of resources,<sup>73</sup> aggregating transactions that are theoretically efficient in isolation should be expected to net an efficient result. In other words, efficiency plus efficiency should at least equal efficiency. However, the post-litigation uses of the land in cases like *Kelo* and *Norwood* cannot be characterized as efficient uses of property. To the contrary, vacant property is a visible sign of economic waste in

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so by market transactions. Government officials frequently complain about the costs and delays of eminent domain.”).

<sup>69</sup> See, e.g., ALA. CODE § 18-1A-55 (2010); DEL. CODE ANN. tit. 29, § 9505 (2010); GA. CODE ANN. § 22-1-9 (2010); IND. CODE § 32-24-1-3 (2010); MICH. COMP. LAWS § 213.55 (2010); N.J. STAT. ANN. § 20:3-6 (2010); S.C. CODE ANN. § 28-2-70 (2010); VA. CODE ANN. § 25.1-204 (2010); WASH. REV. CODE § 8.26.180 (2010).

<sup>70</sup> Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 § 301, 42 U.S.C. § 4651 (2006).

<sup>71</sup> 6 Julius L. Sackman, NICHOLS ON EMINENT DOMAIN § 24.13(1)(a) (rev. 3d ed. 2009) [hereinafter NICHOLS] (“In order to serve the public policy goal of reducing the cost of eminent domain actions by reducing associated litigation expenses, most states now require that the condemnor undertake good faith efforts to negotiate a purchase price with the owner of the land sought to be condemned before initiating formal condemnation proceedings.”).

<sup>72</sup> *Lincoln v. Colusa Cnty.*, 28 Cal. 662, 667 (1865); see also, e.g., *Columbia v. Baurichter*, 713 S.W.2d 263, 266 (Mo. 1986) (“The negotiation requirement of the Missouri condemnation statute was enacted to prevent needless litigation when fruitful negotiations between the owner and the condemnor could occur.”); 6 NICHOLS, *supra* note 71, § 24.13 n.48 (noting that Model Eminent Domain Act § 306 states that the negotiation requirement protects “property owners from arbitrary and unexpected exercises of eminent domain power, facilitat[es] . . . amicable settlement of disputes as to the amount of just compensation, minimize[s] acquisition costs through reduction of litigation and promot[es] . . . citizen cooperation with governmental programs involving land acquisitions”).

<sup>73</sup> Some number of pre-condemnation transfers of title may not be strictly efficient even though title changes hands. An owner may decide to sell because the owner has no hope that the neighborhood will return once demolition begins or does not have the money to contest eminent domain in court. Such an owner may sell the property even though the sales price does not meet the seller’s full valuation of the property. Although some sellers undoubtedly take this approach to the sales of their lands, the number of such sellers is unknown and treated as negligible for purposes of this paper.

*Kelo*-like cases. The property that sits vacant after litigation is the same property that government officials touted as having the potential to rejuvenate a community in the economic doldrums once the property was developed. The sum not only does not equal its parts, but it is the exact opposite of its parts; efficiency plus efficiency equals inefficiency.

The inverse relationship between efficient individual transfers and post-assembly uses that benefit the public interest is the product of a land assembly process that decouples holding title to property and the immediate ability to exploit the productivity of that property. Efficiency analysis compares the pre- and post-transfer uses of property to identify which of those uses increases public wealth. The public, for example, gains a tangential benefit from the transfer of title to an adverse possessor because the adverse possessor is, in fact, making a more productive use of the property than the present possessor. Within the context of eminent domain, a voluntary pre-litigation transfer of title may be deemed efficient because the assembler voluntarily purchases title for a price that meets or exceeds the owner's sale price. But at the time of any single pre-litigation transfer, the ability to acquire title to all lands needed for the project and put the assembled lands to productive use in the future is speculative. From the perspective of the public interest, a project's efficiency is only gauged, and the public benefit can only be obtained, after the property is put to use in conjunction with the redevelopment plan. The public interest does not benefit from the naked transfer of title from property owner to land assembler divorced from the future use of the aggregated property.

The idle properties in New London and Norwood are evidence of the schism between a title transfer that is efficient in isolation and post-assembly use that amounts to post-litigation waste. Acquiring title represents a necessary, but not sufficient, step in a lengthy process that culminates in the successful completion of a development project. In fact, "[i]t rarely happens that proceedings for the condemnation of and for public use are instituted without months, years, and, in some instances, decades of time spent in preliminary discussion and in the making of tentative plans."<sup>74</sup> As plans and litigation proceed over extended periods of time, circumstances change and such changes may adversely impact the prospects for development. The *Kelo* saga unfolded over the course of seven years, while *Norwood*'s eminent domain odyssey took four years to make its way from Norwood's city council to the highest court in Ohio.<sup>75</sup> Those two cases illustrate the risk posed by the passage of time: changes in the developer's viability (*Kelo*) or the unwillingness of ready, willing, and able tenants to wait for the land assembly process to run its course (*Norwood*) made the acquisition of title insufficient to advance the projects.<sup>76</sup>

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<sup>74</sup> 4 NICHOLS, *supra* note 71, § 12B.17(1).

<sup>75</sup> *Kelo v. City of New London*, 843 A.2d 500, 508 (Conn. 2004); *Norwood v. Horney*, 830 N.E.2d 381, 384 (Ohio Ct. App. 2005) (stating that the developer first contacted Norwood about development in 2002).

<sup>76</sup> Katie Nelson, *CT Land Taken from Homeowners Still Undeveloped*, HARTFORD BUS. J. ONLINE (Sept. 25, 2009), [http://www.hartfordbusiness.com/article.php?RF\\_ITEM%5B%](http://www.hartfordbusiness.com/article.php?RF_ITEM%5B%)

The risk of post-litigation waste increases as the bifurcated process of land assembly grinds onward; development plans are title-dependent but not time-independent.

Ironically, one of the factors contributing to the duration of the land assembly process is the public interest itself. Although the public interest is not formally involved in pre-litigation bargaining, it has an unmistakable effect on pre-litigation negotiations between land assemblers and property owners. The most commonly identified impact of the public interest on voluntary negotiations is that it provides an incentive for owners of property in areas targeted for acquisition to hold out. If the land assembler fails to offer a price that matches the owner's valuation of the property, the holdout owner can proceed to trial knowing that the least she will receive for the property is fair market value, which equates to "just compensation" for constitutional purposes.<sup>77</sup> On the other hand, a legal win gives holdouts a virtual injunction against forcible acquisition; therefore, such property owners can hold out for a price that far exceeds the fair market value of the property. The last *Norwood* holdout, for example, purchased his property in 1991 for \$63,900 and, after winning the litigation, sold it to the developer for \$1.25 million.<sup>78</sup> As evidence of the value of holding out longer than one's fellow holdouts, the second to last victorious *Norwood* holdouts received \$650,000 for title to their property.<sup>79</sup>

Within the world of pre-eminent domain litigation bargaining, however, the impact of the public interest is rather Newtonian. The public interest not only provides a property owner with an incentive to hold out, but also instructs a rational land assembler to react with an equal and opposite stratagem to obtain the lowest price for the property. In many cases, the land assembler has a pre-arranged deal with the condemning authority that the latter will use eminent domain to acquire properties that cannot be obtained by voluntary negotiation.<sup>80</sup> If a deal cannot be struck, the land assembler may externalize the cost of

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5D=Article\$0@10395;Article (The executive director of the New London Development Corporation commented that "[i]f there had been no litigation, which took years to work its way through (the court system), then a substantial portion of this project would be constructed by now . . . [b]ut we are victims of the economic cycle, and there is nothing we can do about that.").

<sup>77</sup> *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979) ("The Court therefore has employed the concept of fair market value to determine the condemnee's loss."); *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950) (stating that "[f]air market value has normally been accepted as a just standard" for compensation); LEWIS ORGEL, *VALUATION UNDER THE LAW OF EMINENT DOMAIN* § 21, at 96–99 (James C. Bonbright ed., 2d ed. 1953) (observing that value is determined "at the time of the taking"). Defining "fair market value" as the "value at the time of the taking" presents an interpretative problem because pre-litigation voluntary transfers are, by definition, not takings; therefore, demolition could, in theory, affect "value at the time of taking." *Id.* § 21, at 96 (internal quotation marks omitted).

<sup>78</sup> Kemme, *supra* note 23.

<sup>79</sup> *Id.*

<sup>80</sup> *Norwood*, 830 N.E.2d at 384–85.

acquisition to the public by forcing the condemning authority to acquire title in court. For example, the official bargaining on behalf of the National Park Service in *Althaus v. United States* announced that

I am in charge of acquiring lands for the National Park Service. Even though we know what your lands are worth, we are going to try and get them for 30 cents on every dollar that we feel they are worth. Of course, you don't have to accept this 30 cents on the dollar. We will let you wait for a couple of years. If you don't take 30 cents on the dollar right now, you wait for a couple of years. After a couple of years if you won't take 30 cents on the dollar, we are going to condemn it. We will condemn your property. You know what that is going to mean? That means that you are going to have to hire an expensive lawyer from the city and he is going to take one-third of what you get. Plus, you know who is going to have to pay the court costs. You are. That is in addition to these expensive lawyers.<sup>81</sup>

Thus, the public interest that looms in the shadow of pre-litigation negotiations simultaneously reduces a land assembler's incentive to bargain and diminishes the land assembler's risk of loss if voluntary bargains cannot be reached. The impact of the public interest on pre-litigation private negotiations is to provide a land assembler with an incentive to hold out just like the property owners on the other side of the bargaining table.

Using the public interest as a backstop during pre-litigation negotiations is not the only strategy employed by land assemblers designed to pry title from property owners on favorable terms. Once title to a property is acquired, the land assembler often razes the structures located on the property after acquisition but prior to obtaining title to all of the land for the project. In both *Kelo* and *Norwood*, for example, most of the property owners in the areas targeted for redevelopment voluntarily agreed to sell their properties to the assembler before litigation.<sup>82</sup> Prior to assembling all of the parcels necessary for development, the land assembler bulldozed the structures on those properties.<sup>83</sup> Notably, the "acquire and destroy" pattern of land assembly is not limited to the circumstances in either New London or Norwood. Rather, it appears to be an integral part of the land assembler's standard playbook. The "hole" grows in

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<sup>81</sup> *Althaus v. United States*, 7 Cl. Ct. 688, 691–92 (1985). *But see* *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 176 (Tex. 2004) (containing data showing that the pre-condemnation offers exceeded actual condemnation awards in that case).

<sup>82</sup> *Kelo v. City of New London*, 545 U.S. 469, 475 (2005); *Norwood*, 830 N.E.2d at 385.

<sup>83</sup> JEFF BENEDICT, *LITTLE PINK HOUSE* 238–39, 374 (2009) (noting that the condemning authority had begun to clear structures from the acquired lands four years prior to its ultimate settlement with *Kelo*); Kemme, *supra* note 23.



Brooklyn because the Atlantic Yards developer began demolition prior to the acquisition of title to all of the parcels necessary for the project.<sup>84</sup>

As a bargaining tactic, the impact of a land assembler's quick demolition of structures on acquired properties is subjective—remaining owners have an increased incentive to sell because the incentives to remain decrease as structures within the targeted area are destroyed. Commenting on the effect of unoccupied properties created during 1960s urban renewal, the Housing and Finance Agency's general counsel observed that "the percentage of empty houses becomes more than the remaining residents can bear, and they are forced out, regardless of the burden placed upon them of such premature moving."<sup>85</sup> If the incentive to move linked to empty buildings is great, the incentive should be equally great once the lots are cleared and rubble mounts. Indeed, Susette Kelo expressed reticence about remaining in Fort Trumbull if she won her case after all of the properties had been bulldozed and her neighbors had moved.<sup>86</sup>

Although it unquestionably benefits assemblers in the short term, the "acquire and destroy" strategy used during the private phase of land assembly imperils the long-term public interest. Because most properties in targeted areas are acquired by voluntary agreement,<sup>87</sup> "acquire and destroy" permits a land assembler to demolish structures on a majority of properties before securing title to all necessary properties or knowing that such title will ever be acquired. Successful completion of a project, however, is not solely dependent upon title aggregation. The *Kelo* plaintiffs lost while the *Norwood* plaintiffs were victorious, and the assembler in each case eventually obtained title to all necessary plots of land.<sup>88</sup> Nevertheless, both projects stalled and the promised kinetic energy to be generated from the project remains untapped. Destroying structures on acquired properties without having title to all parcels is a means to an end that is alleged to promote the public interest, but that end may never be achieved, leaving the public to pay the costs of the means.

The invisible costs to which the public has been exposed because of the duration of the land assembly process and pre-assembly destruction crystallize if development fails to materialize after title issues are resolved. Property taxes on acquired properties may decline after demolition to reflect the absence of

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<sup>84</sup> *Atlantic Yards, Inch by Inch*, N.Y. MAG. (Mar. 29, 2009), <http://nymag.com/news/intelligencer/topic/55684/> (describing three major lawsuits and "roughly ten minor legal skirmishes" associated with the project).

<sup>85</sup> Lyman Brownfield, *The Disposition Problem in Urban Renewal*, 25 LAW & CONTEMP. PROBS. 732, 738 (1960).

<sup>86</sup> BENEDICT, *supra* note 83, at 363 (One of the reasons Kelo decided to leave the property was that "she got a sense of what it would feel like if she prevailed and got to stay in the fort—awfully lonely.... The thought of staying behind in an abandoned neighborhood without her friends felt terribly depressing.").

<sup>87</sup> 7 NICHOLS, *supra* note 71, § G6.01[9][a] ("The vast majority of private property needed for public use is acquired without the necessity of condemnation.").

<sup>88</sup> See Kemme, *supra* note 23; George Lefcoe, *Jeff Benedict's Little Pink House: The Back Story of the Kelo Case*, 42 CONN. L. REV. 925, 953–55 (2010) (book review).

structures on the property.<sup>89</sup> Moreover, owners of neighboring properties untouched by the redevelopment plan must confront the risk that their property values will decrease due to problems that often accompany vacant properties.<sup>90</sup> And if neighboring owners believe that their properties might be in the crosshairs of compulsory acquisition in the future, they have a reduced incentive to maintain their properties, a phenomenon termed “condemnation blight.”<sup>91</sup> In addition to the loss suffered by individual property owners, a community stands to lose millions of dollars after property acquired for redevelopment devolves into a large field of weeds. New London, for example, sunk a substantial amount of money into its redevelopment project in the form of new infrastructure to accommodate large-scale development and tax incentives to bring Pfizer to town.<sup>92</sup> If the development project is abandoned, such investments are wasted unless another developer takes over the project with identical infrastructure needs, which, in New London’s case, has not yet happened.

The absence of post-litigation development not only externalizes an objective financial cost to the public, but also imposes a subjective cost on the public. Post-litigation desolation erects a subjective impediment to future development of the site. According to one account of the post-*Kelo* prospects for the Fort Trumbull neighborhood in New London, future developers are not expected to rush to develop the site because of its turbulent history.<sup>93</sup> The field of weeds is a symbol of compulsory acquisition of private property that

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<sup>89</sup> See David Collins, *Think Small at Fort Trumbull*, THE DAY (New London), Nov. 25, 2009, at B1 (discussing a proposal that would “be a short route to putting the property [Fort Trumbull] back on the tax rolls”).

<sup>90</sup> Garnett, *supra* note 31, at 955 (listing such problems as “crime, vandalism, fire hazards, and worry about unsafe and unsanitary conditions”). But see John Brooks & William Busch, *Perception v. Reality: A Commentary on Media Bias and Eminent Domain*, RIGHT OF WAY INT’L ASS’N, 23 (May/June 2008), <https://www.irwaonline.org/EWEB/upload/0508a.pdf> (noting that New London’s tax revenue did not diminish much as a result of redevelopment).

<sup>91</sup> 4 NICHOLS, *supra* note 71, § 12B.17(6).

<sup>92</sup> Collins, *supra* note 89 (describing difficulties associated with pursuing a different project in light of the addition of streets and utilities to benefit large development at the site); Ted Mann, *Bringing Pfizer to New London Came at a Heavy Cost to Taxpayers*, THE DAY (New London), Nov. 21, 2009, at A1.

<sup>93</sup> Brooks & Busch, *supra* note 90, at 23 (“The cost of the negative media attention to *Kelo* may still be affecting the City of New London to this day. While projects and site plan approvals are in place for about half of the development parcels, there are still parcels available, and funding is tight for the remaining public investment required to complete the project. There is no question that the delays due to litigation have been costly in terms of financial exposure and loss of momentum. We believe that some of this can be attributed to the media attention given the case. There are many theories regarding the usefulness of name recognition, regardless of the source. In this case the name recognition has definitely come at a cost, since the media coverage was primarily very negative, and we have really been unable to ‘manage’ it in any sense.”). Furthermore, the authors anticipate a bright future for New London “once the *Kelo* stigma has been shaken.” *Id.* at 25.

forestalls post-litigation development efforts. Notably, stigmatization of real property is not unknown to property law. Statutory law in several states recognizes subjective stigma associated with psychologically impaired property for purposes of real estate disclosures.<sup>94</sup> The stigmatization of the property in *Kelo* differs from the stigma comprehended by real estate statutes, but the property is nonetheless stigmatized, and the absence of meaningful post-assembly proposals is a testament to the deleterious impact of that subjective stigma. In fact, in early 2010, a developer made a formal proposal for developing the New London site, but has yet to break ground on the project.<sup>95</sup>

### III. ALTERNATIVE MEANS OF LAND ASSEMBLY

Unlike the attack on *Kelo* launched by most post-*Kelo* scholarship, two recent scholarly proposals argue that the holdout problem can be averted by implementing a process of land assembly that differs from the traditional bifurcated model. The corollary to these proposals is that altering the process of land assembly obviates the need for eminent domain in *Kelo*-like settings. As a result, those two proposals—creating land assembly districts and secret purchases of land—have a direct bearing on the problem of post-litigation waste accompanying the traditional two-stage process of land assembly. While each provides valuable insight, neither comprehensively addresses the risk of post-litigation waste associated with land assembly; therefore, the real-world outcomes in New London and Norwood remain a possibility under either proposal.

#### A. Land Assembly Districts

A land assembly district (LAD) utilizes intra-neighborhood negotiations as a mechanism to transfer land to a developer without eminent domain. To form an LAD, an interested party presents government officials with a plan that includes a description of the area targeted and the future use of the land once assembled.<sup>96</sup> If approved, government officials organize meetings at which affected property owners learn about LADs and listen to presentations from potential purchasers of the neighborhood as well as opponents of potential sales.<sup>97</sup> Once the LAD receives an offer, the neighborhood debates the merits of

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<sup>94</sup> IND. CODE § 32-21-6-3 (2010) (defining “psychologically affected property”); MASS. GEN. LAWS ch. 93, § 114 (2010) (recognizing “psychologically impacted property”); MO. REV. STAT. § 442.600 (2000) (defining “psychologically impacted real property”); R.I. GEN. LAWS § 5-20.8-6 (2009) (governing “[d]isclosure of psychologically impacted property”).

<sup>95</sup> Kathleen Edgecomb & Stephen Chupaska, *NLDC to Explore Developer’s Plan for Village Theme at Fort Trumbull*, THE DAY (New London), Feb. 20, 2010, at A1.

<sup>96</sup> Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1488–89 (2008) (noting that the “LAD promoter” could be just about anyone who thinks an area may be ripe for economic development).

<sup>97</sup> *Id.* at 1490–91.

the offer and a formal vote on the proposed sale is taken.<sup>98</sup> Voting rights among affected property owners are apportioned according to the percentage of property owned within the area designated for sale.<sup>99</sup> If the sale is approved by a majority of voting property owners, the entire neighborhood is transferred to the winning bidder.<sup>100</sup> If, on the other hand, the proposition fails to gain majority approval from the affected voters, the properties remain titled in their present owners and “all possibility of assembly by any means other than voluntary private assembly would be at an end.”<sup>101</sup>

The LAD approach to land assembly differs from the typical land assembly process in three distinct ways. First, an LAD involves a one-step process as opposed to the two-step process associated with most redevelopment projects—property owners collectively participate in a “one-shot deal” based upon a tally of the individual votes.<sup>102</sup> For an individual voter, an affirmative vote means that the owner’s share of the proceeds is greater than or equal to the owner’s full valuation of the property to be sold. On the other hand, if the offered price falls below that amount, an owner is likely to vote against the sale of the neighborhood. If a sufficient number of voters are like-minded, the sale will not be approved and the owners will retain their properties.<sup>103</sup> Thereafter, the assembler will have to assemble the properties on a piecemeal basis if the project is to move forward. Second, the public interest is introduced at the beginning of the LAD process via LAD certification as opposed to at the end of the bifurcated land assembly process. The public interest cannot be asserted at the end of the LAD mechanism because eminent domain is not an option after a negative vote on the sale of the neighborhood.<sup>104</sup> Finally, the LAD gives owners within the district “the collective power to force each member of the LAD to accept a land assembler’s proposal to buy the neighborhood;” holdouts cannot block the sale of the entire neighborhood.<sup>105</sup>

Because some owners are likely to object to the sale of their properties, an owner may opt-out of the LAD sale and “insist that his or her parcel be purchased through ordinary eminent domain procedures.”<sup>106</sup> This is the equivalent of a just compensation hearing associated with traditional eminent domain procedure and ensures that all owners receive no less than the amount

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<sup>98</sup> *Id.* at 1491.

<sup>99</sup> *Id.* at 1503.

<sup>100</sup> *Id.* at 1469 (specifying that selling the neighborhood requires majority approval from stakeholders and that voting rights are apportioned by property ownership within the LAD).

<sup>101</sup> *Id.* at 1491.

<sup>102</sup> *Heller & Hills*, *supra* note 96, at 1472.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 1491.

<sup>105</sup> *Id.* at 1488.

<sup>106</sup> *Id.* at 1496.

that satisfies constitutional requirements.<sup>107</sup> However, proponents of LADs expect few holdouts because the LAD may receive bids on the properties from multiple offerors, which increases competition for the properties.<sup>108</sup> Competitive bidding is likely to produce larger cash distributions per opt-in owner than the opt-out owner is likely to obtain as just compensation in court; therefore, the likelihood of holdouts shrinks.<sup>109</sup> Owners receiving greater payouts following the sale of an entire neighborhood are, in essence, capturing a greater proportion of the assembly value of the parcels of land in the neighborhood.<sup>110</sup>

The ability of an owner to opt out of the LAD, however, is likely to transform the one-shot deal into a two-shot deal, thereby mirroring the two-step land assembly process of statutorily required private negotiation and litigation. While multiple buyers might compete to acquire the land, thereby driving up the price of the assembled lands, history suggests that multiple buyers will not readily participate in a competitive bidding process.<sup>111</sup> Examples of government acquisition of property for redevelopment and subsequent failure to secure a developer are legion. A study conducted during the heyday of urban renewal, for example, concluded that governments spent an average of three years attempting to sell the land they had acquired for purposes of redevelopment.<sup>112</sup> Following the same pattern, the developer in *Kelo* abandoned the project in 2008, and developers have not scrambled to acquire the now-vacant properties at issue in the case.<sup>113</sup> While the *Kelo* properties are tainted by the national controversy, the historical number of failed projects involving a post-land assembly lack of developer interest indicates that New London's plight is not extraordinary. If competition for LAD properties fails to materialize, the amount of money to be distributed upon sale is not much of a barrier against opting out.

Even if multiple bids are made for LAD properties, history again suggests that increased money is an insufficient inducement to prevent some property owners from fighting to retain their properties. General Motors offered above-

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<sup>107</sup> *Id.* at 1470 (stating that "owners within a LAD . . . have the right to opt out and receive the full, existing measure of constitutional protection (that is, condemnation based on fair market value)").

<sup>108</sup> *Heller & Hills*, *supra* note 96, at 1496–97.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 1468–69. For other examples involving the capture of assembly value, see Michelle Crouch, *A Neighborhood in North Carolina Is Put Up for Sale*, N.Y. TIMES, Aug. 14, 2005, § 11, at 8 (detailing several examples involving the sale of an entire neighborhood).

<sup>111</sup> This is not intended to suggest that such competition has not occurred in the past or would never occur in the future. Examples of such bidding exist. *See, e.g.*, Crouch, *supra* note 110 (describing several examples involving the sale of an entire neighborhood).

<sup>112</sup> David B. Carlson, *The Unrealized Profits in Urban Renewal*, ARCHITECTURAL FORUM, July 1962, at 101.

<sup>113</sup> Kathleen Edgecomb, *Yale Group Looking Long-Term at Fort Trumbull*, THE DAY (New London), Apr. 21, 2010, at B1.

market incentives to residents of a neighborhood in Michigan so that it could build an assembly plant on their properties after acquisition.<sup>114</sup> Nonetheless, a number of the residents held out and a protracted legal battle resulted in Michigan's maligned decision in *Poletown Neighborhood Council v. City of Detroit*.<sup>115</sup> Similarly, the developer in *Norwood* offered to pay each owner 35% above fair market value for their properties, but five owners held out.<sup>116</sup> Offers above fair market value merely serve to supplement financial assistance available under current law to property owners losing title to property by eminent domain.<sup>117</sup> In fact, property owners commonly receive more than fair market value for the properties taken by eminent domain because of statutorily required payments.<sup>118</sup> Notwithstanding attractive financial incentives, the number of projects that have been completed without holdouts is microscopic compared to those that confront holdouts.

In addition to the monetary incentive to opt-in produced by competitive bidding for the neighborhood, informal pressure from neighbors could dissuade fellow neighbors from opting out, particularly if property owners receive offers above fair market value for their properties. Neighbors in favor of selling the neighborhood are, after all, in a prime position to exert pressure on other neighbors to accept the deal.<sup>119</sup> But pressure from neighbors fails to influence holdouts if money does not serve as the basis of the holdout. The voluntary sales contracts in *Norwood* included financial bonuses that were originally conditioned on the acquisition of all of the parcels for the project,<sup>120</sup> increasing the tension between would-be payout recipients and holdouts. One neighbor commented that "[i]f this had happened twenty-five years ago, somebody would have been found at the bottom of the Ohio River."<sup>121</sup> Despite an alleged agreement not to harass the holdouts, angry owners who wanted their payouts

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<sup>114</sup> James Kelly, *The Last Days of Poletown*, TIME, Mar. 30, 1981, at 29.

<sup>115</sup> *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), *overruled by* Cnty. of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004). For criticism of the *Poletown* decision, see, for example, Jenny Nolan, *Auto Plant vs. Neighborhood: The Poletown Battle*, DETROIT NEWS (Jan. 27, 2000), <http://apps.detnews.com/apps/history/index.php?id=18>.

<sup>116</sup> Gary Greenberg, *The Condemned*, MOTHER JONES, Jan./Feb. 2005, at 42, 44–45, available at <http://motherjones.com/politics/2005/01/condemned?page=1>.

<sup>117</sup> Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 121 (2006); see also Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 §210, 42 U.S.C. § 4630 (2006).

<sup>118</sup> Garnett, *supra* note 117, at 121. This, of course, might also provide an incentive to hold out because the financial package available after a court-ordered taking might exceed the financial package offered by the assembler.

<sup>119</sup> ROBERT C. ELLICKSON & VICKI BEEN, LAND USE CONTROLS 854 (3d ed. 2005).

<sup>120</sup> John Gibeau, *Taking Control: The Eminent Domain Controversy Finds a Battlefield in the Development of a Cincinnati Suburb*, A.B.A. J., Dec. 2005, at 45, 50. Before an appellate court handed down its decision regarding the result at trial, the developer began closings, which paved the way for demolition. *Id.* at 49.

<sup>121</sup> *Id.* at 50.

posted signs deriding the holdouts.<sup>122</sup> Nevertheless, the *Norwood* holdouts withstood the pressures and pressed the case to the highest court in Ohio—and won. Holding out under informal pressure demonstrates that the above market offer to purchase did not account for the subjective value the holdouts placed on the property.<sup>123</sup>

Similar to the swirl of litigation that accompanies most holdouts subject to eminent domain, opting out of the LAD is likely to breed litigation. Because LADs do not utilize eminent domain, opt-outs cannot challenge the loss of their properties on public use grounds. Nevertheless, opting-out owners who want to fight the loss of property will not fail to find a legal challenge to reverse an affirmative vote to sell the neighborhood. In fact, property owners challenging a taking often raise legal claims outside of the constitutional public use context. Poletown residents, for example, attacked the acquisition of their properties on the ground that it violated the Michigan Environmental Protection Act.<sup>124</sup> While the *Poletown* holdouts did not win their environmental claim,<sup>125</sup> the assertion forced the City to defend the claim, drained resources, and consumed time for all of the parties involved in the process. Given the certification, debate, and voting procedures required to implement an LAD sale, opt-out owners should have fertile ground upon which to file a claim. Dissatisfied owners, for example, may challenge the government's certification of the LAD on due process grounds or claim that the allocation of voting rights violates the Equal Protection Clause.<sup>126</sup>

The ongoing battle over Brooklyn's Atlantic Yards project provides a vivid display of the variety of legal challenges that may be deployed to arrest redevelopment projects in the short term. Local residents have filed no less than thirteen lawsuits against the condemnor in an effort to halt the project.<sup>127</sup> In addition to a public use claim under state law, challengers have alleged

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<sup>122</sup> Greenberg, *supra* note 116, at 47 (“[Y]ellow signs bearing messages like ‘HELD HOSTAGE’ and ‘WE SUPPORT ROOKWOOD EXCHANGE’ sprout[ed] like dandelions from front lawns, and a king-size bedsheet banner hanging from Sandy Dittoe’s pink stucco one-story declar[ed], ‘64 OF 65 RESIDENTS WANT OUT. I AM ONE OF THEM.’”).

<sup>123</sup> Gibeaut, *supra* note 120, at 46 (asserting that one of the *Norwood* holdouts commented that the home was “our castle” and “[w]e didn’t have to share anything with anybody”); Greenberg, *supra* note 116, at 44 (reporting that one of the *Norwood* holdouts stated that “[w]e started here, we raised two kids here, we finish up here”).

<sup>124</sup> *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 460 (Mich. 1981).

<sup>125</sup> *Id.*

<sup>126</sup> This Article will not address the merits of these claims, but only offers them as examples of arguments that might be made against a LAD that differ from those that are typically made in the context of eminent domain. For an analysis of an equal protection claim, see *Heller & Hills*, *supra* note 96, at 1503–07.

<sup>127</sup> *Atlantic Yards*, *Inch by Inch*, *supra* note 84 (describing three major lawsuits and “roughly ten minor legal skirmishes” associated with the project).

violations of environmental laws,<sup>128</sup> infringement of the attorney-client privilege,<sup>129</sup> and questioned the legality of the project's planning in court filings.<sup>130</sup> Recently, the New York Court of Appeals upheld the exercise of eminent domain against the public use challenge.<sup>131</sup> Despite the adverse public use ruling, several groups have considered filing yet another Atlantic Yards lawsuit alleging improprieties in the sale of bonds to fund the project.<sup>132</sup> If the Atlantic Yards complainants can allege such a broad array of non-public use claims, dissatisfied LAD owners should find no shortage of legal claims to press as well.

The outcome of the litigation may impact the viability of the LAD project in the future, but the immediate effect of opt-out litigation is to increase the time between title transfers and productive use of the aggregated properties, thereby endangering the long-term prospects of the project. Many states permit "redevelopment projects to begin even before the validity of the condemnation has been adjudicated or compensation awarded."<sup>133</sup> Because demolition may begin before completing the LAD process of land assembly, the possibility of post-litigation waste emerges as opt-out owners file legal challenges while the structures on neighboring properties are leveled. Litigation consumes time, and circumstances may change as time passes. If any of the substantive legal claims is a winner or the feasibility of development changes from its initial conditions, the homes and businesses belonging to opt-outs could be the only structures standing in the area. Under those circumstances, the appearance of the LAD will mirror that of New London and Norwood, and the costs of the sale and demolition of the properties will again be borne by the public.<sup>134</sup>

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<sup>128</sup> *Develop Don't Destroy (Brooklyn) v. Urban Dev. Corp.*, No. 0104597/2007, 2008 WL 206942, at \*2 (N.Y. Sup. Ct. Jan. 11, 2008).

<sup>129</sup> *Develop Don't Destroy Brooklyn v. Empire State Dev. Corp.*, 816 N.Y.S.2d 424, 430 (App. Div. 2006).

<sup>130</sup> *Develop Don't Destroy (Brooklyn) v. Empire State Dev. Corp.*, No. 114631/2009, 2010 WL 936220, at \*1 (N.Y. Sup. Ct. Mar. 10, 2010).

<sup>131</sup> *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 170–73 (N.Y. 2009). Furthermore, the New York Court of Appeals relied on *Goldstein* to uphold an exercise of eminent domain to eradicate blight in *Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721, 730–33 (N.Y. 2010). The land sought to be acquired in *Kaur* is slated to be transferred to Columbia University for purposes of campus extension. *Id.* at 724.

<sup>132</sup> Norman Oder, *Hail Mary or Silver Bullet: Perkins, Raising Questions of Fraud in Arena Bond Sale, Asks to Put Atlantic Yards on Hold*, ATLANTIC YARDS REP. (Dec. 19, 2009 5:12 PM), <http://atlanticyardsreport.blogspot.com/2009/12/hail-mary-or-silver-bullet-perkins.html>. The *Goldstein* decision was issued on November 24, 2009; therefore, the potential legal action described in the blog post must be filed, if ever, after losing the public use issue.

<sup>133</sup> *Heller & Hills*, *supra* note 96, at 1496–97.

<sup>134</sup> For another critique of LADs, see Daniel B. Kelly, *The Limitations of Majoritarian Land Assembly*, 121 HARV. L. REV. F. 7 (2009), [http://www.harvardlawreview.org/issues/121/april08/forum\\_507.php](http://www.harvardlawreview.org/issues/121/april08/forum_507.php).



### B. *Secret Purchases of Property*

Compared to the complexity of a LAD with its certification, voting, and opt-out provisions, the assembly of land using secret purchases is relatively straightforward. Indeed, the Sixth Circuit described secret purchases of land as a “common arms-length business practice.”<sup>135</sup> On the surface, assembling land via secret purchase involves nothing more than a series of individual land transactions between a buyer and seller where the buyer intends to use the land for a different purpose after purchase. The difference, however, is that the “buyer” is not offering to purchase the property for the buyer’s own purposes. Instead, the “buyer” is an agent for an undisclosed principal. In many cases, the party negotiating with the property owner knows neither the true identity of the principal nor the project for which the property is being assembled.<sup>136</sup> Because neither “buyers” nor sellers have full information about the principal or future usage of the assembled lands, secret land assembly is a “double-blind acquisition system.”<sup>137</sup>

Apart from the secrecy shrouding the principal, secret purchases of property for assembly purposes differ from the typical bifurcated process in one basic way—negotiations do not occur in the shadow of eminent domain. Without the background of eminent domain, the incentive to bargain strategically decreases because a seller neither knows the identity of the principal nor the purpose of the purchase.<sup>138</sup> Either a secret buyer’s offer meets the property owner’s full valuation of the property, or the present owner retains title to the property.<sup>139</sup> Consequently, secret purchases avoid the risk of holdouts that justifies the imposition of eminent domain as the last phase of the prototypical land assembly process. For an undisclosed principal, a secret assembly saves money that would be spent to induce strategic holdouts to transfer title under the traditional two-step method of land assembly. Similarly, a secret purchase has a cost-saving function for a condemning authority—full assembly of necessary parcels obviates the need for eminent domain.<sup>140</sup>

Despite the Sixth Circuit’s characterization of secret purchases as a “common” practice, voluntary sales of entire neighborhoods are, to say the least, rare. If the approach held such promise, one might expect that developers would have seized upon it before *Kelo*. This does not mean that an attempt to

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<sup>135</sup> *Westgate Vill. Shopping Ctr. v. Lion Dry Goods Co.*, No. 93-3760, 1994 WL 108959, at \*7 (6th Cir. Mar. 30, 1994).

<sup>136</sup> Daniel B. Kelly, *The “Public Use” Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 20–21 (2006).

<sup>137</sup> *Id.* at 21.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Kelo v. City of New London*, 545 U.S. 469, 489 n.24 (2005) (recognizing that developers could engage in “secret negotiations” for the purchase of land for development, thereby eliminating the need for eminent domain).

purchase a large number of closely situated properties in secrecy is doomed to failure. To the contrary, some attempts at secret purchases have been successful.<sup>141</sup> However, the paucity of successful examples demonstrates the limited utility of the approach as a substitute for the traditional bifurcated process of eminent domain land assembly. Even among the small sample size of successful secret assemblies, one of the commonly cited “successes” required eminent domain to secure title to a few properties after acquiring title to most of the parcels in secret.<sup>142</sup> Reviewing the limited number of successful secret assemblies suggests that, in most cases, the success of the secret assembly relied on fortune as much as design.<sup>143</sup>

One of the primary impediments to secret assemblies of land is that the advantage of secrecy lasts only so long as the principal’s identity, in fact, remains secret. If the secret is discovered, the land assembly process transforms into a mirror image of the bifurcated process of land assembly. To assemble the land required for “Disney’s America” in Virginia, for example, Disney established a network of dummy corporations and engaged “buyers” (lawyers) in different states to handle the transactions.<sup>144</sup> Disney also created a paper intermediary through which all monetary transactions were funneled and took steps to prevent “buyers” from discovering one another’s identities, even if they worked at the same firm.<sup>145</sup> If those measures were not enough, Disney channeled all mail concerning the transactions through one office that “meticulously switched” envelopes, and telephone calls were made using a “special 800 number that could not be traced.”<sup>146</sup> Despite these efforts, *The Washington Post* went public with Disney’s identity, which had the effect of

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<sup>141</sup> See, e.g., Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CALIF. L. REV. 75 (2004) (detailing the voluntary transaction between the property owners in Cheshire, Ohio, and American Electric Power Company by which the latter bought the entire town of Cheshire); Crouch, *supra* note 110 (describing several examples involving the sale of an entire neighborhood). But see Heller & Hills, *supra* note 96, at 1473 (noting the rarity of successful secret purchases of land).

<sup>142</sup> Brief Amicus Curiae of John Norquist, President, Congress for New Urbanism in Support of Petitioners at 7 n.7, *Kelo*, 545 U.S. 469 (No. 04-108).

<sup>143</sup> For example, the Norquist amicus brief cites successful examples in locales such as Las Vegas and Providence, Rhode Island. However, the Las Vegas project took five years to assemble the land. *Id.* at 5–6. Similarly, the property for Providence’s successful development was amassed over the course of fifteen years. Brief of Amici Curiae Connecticut Conference of Municipalities & the State Municipal Leagues of Alabama et al. in Support of Respondents at 14, *Kelo*, 545 U.S. 469 (No. 04-108). Given the lengthy process associated with each of these successes, the developers seem lucky to have maintained secrecy for the duration of the process.

<sup>144</sup> Tim O’Reiley, *Playing Secret Agent for Mickey Mouse*, LEGAL TIMES, June 10, 1994, at 2.

<sup>145</sup> *Id.* at 21 (If the attorney-appointed president “was ever asked about his sudden interest in the meat business, he [would] say[] he was told not to lie, but to admit to the skimpy corporate filing.”). The steps taken to preserve buyer anonymity are not specified in the article.

<sup>146</sup> *Id.*

transforming remaining property owners into holdouts.<sup>147</sup> At that point, Disney's choices were identical to those facing land assemblers using the bifurcated process: continue negotiations, forego acquisition of holdout properties or the project in its entirety, or ask local government to use eminent domain. Disney ultimately shelved its plans for "Disney's America" amid concerns about the park's proximity to the Civil War battlefield at Manassas, the environmental impact of the park, and the nature of exhibits to be displayed at the park.<sup>148</sup>

Beyond the internal transaction costs associated with maintaining secrecy until assembly is complete, the strategy works best in contexts where external transaction costs are low. During a flight over central Florida in 1963, for example, Walt Disney identified a "wasteland southwest of Orlando where alligators outnumbered people" for development.<sup>149</sup> By 1965, Disney had purchased more than 25,000 acres of land "under a strict cloak of secrecy" from owners who "were glad to sell dirt cheap" because the property could not be used for agricultural purposes.<sup>150</sup> A major part of Disney's successful assembly derived from the combination of a small number of property owners with the limited utility of the desired properties. Because the "sludgy terrain was useless for agriculture" and "far from Florida's beaches,"<sup>151</sup> the objective fair market value of the properties was not nearly as high as in other parts of the state. Furthermore, the subjective value of many of the properties was also low because their owners obtained title to the properties by inheritance and had never seen the properties.<sup>152</sup> Thus, the transaction costs associated with Disney's secret purchases were low, which facilitated the sales.

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<sup>147</sup> *Id.* at 2 (Disney apparently deemed the parcels that escaped its grasp as "not essential" to the project but just as parcels that would have been "nice to have.").

<sup>148</sup> Susan Baer, *'Disney America': Fighting Words in the Hills of Northern Virginia*, BALT. SUN, June 19, 1994, at A1; see also Nikita Stewart, *\$17 Million Camp Pledges Cut Scout Nirvana in Va.*, WASH. POST, Apr. 5, 2006, at A1 (noting that Disney sold the site to the Boy Scouts in 1994 for \$1.7 million). For additional information regarding the arguments against Disney's project, see, for example, Jeff Daniel, *From Tragedy to Spectacle: Recent Exhibits Highlight Merchandising of Disaster*, ST. LOUIS POST-DISPATCH, Dec. 16, 2001, at B1 ("[T]aste and tone become crucial elements in 'how' historical material gets presented. In fact, they are sometimes controversial. In the early '90s, a firestorm erupted when the Walt Disney Co. announced plans for a Virginia theme park titled 'Disney's America.' What rankled critics, especially a vocal number of African-Americans, were plans for a slavery exhibit—including reenactments—in the half-billion dollar project. Thrill rides. Snow cones. Slave auctions. Even Disney eventually saw the incongruities, and by 1994 the park was shelved.").

<sup>149</sup> Mark Andrews, *Disney Assembled Cast of Buyers to Amass Land Stage for Kingdom*, ORLANDO SENTINEL, May 30, 1993, at K2.

<sup>150</sup> *Id.*

<sup>151</sup> T. D. Allman, *The Theme-Parking, Megachurching, Franchising, Exurbing, McMansioning of America: How Walt Disney Changed Everything*, NAT'L GEOGRAPHIC, Mar. 2007, at 96, 99.

<sup>152</sup> Andrews, *supra* note 149 (noting that some owners "had received their land through inheritances" and "had never seen it").

Unlike the low objective and subjective value of “wasteland,” the context of *Kelo*-like takings is likely to involve high transaction costs that preclude secret acquisition of all parcels necessary for the project. The areas sought for redevelopment in *Kelo* and *Norwood* contained numerous parcels of land with numerous owners. Property owners are likely to suspect that something unusual is happening either when they are approached about selling their properties—even though their properties are not for sale—or as neighbors suddenly move without placing their properties on the market.<sup>153</sup> If property owners suspect that land is being assembled for a change in land use, the potential for strategic bargaining increases. Furthermore, an owner might place a high subjective value on property in a *Kelo*-like setting because it is the family home, which increases the probability of a holdout.<sup>154</sup> If the parcels cannot be acquired through mutual agreement and the undisclosed principal remains committed to acquisition, the process of secret land assembly transforms into *Kelo* and *Norwood*’s two-step process of land assembly.

In economic terms, the cloak-and-dagger measures taken by secret principals represent transaction costs, and creating transaction costs is unnecessary if property owners willingly sell their properties to interested buyers. Secrecy saves costs if owners who willingly part with title in the absence of information about the principal would have held out for more money if the principal’s identity had been known. The problem for secret buyers and their principals is that they cannot distinguish a priori between owners holding out for strategic purposes and those that refuse to sell regardless of the amount of the offer. While some owners will undoubtedly hold out under any circumstances, the number of complainants in most eminent domain cases suggests that such holdouts are less common than often claimed. New London’s redevelopment project at issue in *Kelo* required the acquisition of 115 privately owned parcels of land and only nine property owners refused to transfer title voluntarily.<sup>155</sup> The Fort Trumbull holdouts controlled a mere 2% of the ninety acres sought to be acquired for development.<sup>156</sup> Similarly, the *Norwood*

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<sup>153</sup> Mark Seidenfeld, *In Search of Robin Hood: Suggested Legislative Responses to Kelo*, 23 J. LAND USE & ENVT. L. 305, 318 (2008) (“Even if the buyer hides its identity with respect to each purchase, in order to purchase all the parcels the buyer will eventually have to take the initiative to approach those who have not put their property on the market. This will tip off perceptive observers that someone is really interested in parcels in the area, and eventually will reveal the plans of the buyer, which in turn will encourage holdouts.”).

<sup>154</sup> Amicus Curiae Brief on the Merits of Mountain States Legal Foundation & Defenders of Property Rights in Support of Petitioners at 3, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108) (Wilhelmina Dery, one of the *Kelo* holdouts, was born in the house sought to be acquired and had resided there with her husband for fifty years prior to the taking.). Commercial owners may place a high subjective value on their properties due to the goodwill that has been generated in that location over time.

<sup>155</sup> *Kelo*, 545 U.S. at 474–75.

<sup>156</sup> BENEDICT, *supra* note 83, at 15.

holdouts owned five of the sixty-nine parcels required for development.<sup>157</sup> For the majority of property owners who own parcels slated for development, the transaction costs associated with transforming an ordinary land transaction into a quasi-CIA operation are wasted; the deal would have occurred without incurring those costs.

Secret purchases of property do more than waste resources to maintain secrecy of transactions that would occur without secrecy; the duration of many projects using secret purchases to assemble land also permits a change of circumstances to affect those projects. Harvard University, for example, secretly acquired fifty-two acres of property for purposes of expansion using an undisclosed buying agent who purchased \$88 million worth of real estate over the course of a decade.<sup>158</sup> During the decade-long secret assembly, local residents had been “living alongside all of Harvard’s vacant buildings and abandoned property for almost 10 years,”<sup>159</sup> which drained the economic and social life from the area.<sup>160</sup> In late 2009, Harvard announced that it would postpone development of the secretly acquired parcels because of the effect of the nation’s financial downturn on Harvard’s endowment.<sup>161</sup> Stopping construction of Harvard’s new science complex has left “a giant hole in the ground.”<sup>162</sup> For now, the end result of secrecy is not dramatically different from real world consequences in New London and Norwood.

#### IV. A DIFFERENT STRATEGY TO REDUCE EMINENT DOMAIN WASTE

Whether pursuant to statutory mandate, LAD, or secret purchase, the sequence of acquisition, demolition, and delay externalizes costs to the public if the promised development fails to rise from demolition rubble. To counter this risk to the public interest, this Article proposes that interests in property acquired prior to the assembly of all parcels of land necessary for development should be held in a land preservation trust (LPT). Given its sufficiently flexible nature, a trust is an appropriate vehicle to hold title to the properties because it can not only reduce externalities spawned by private negotiation, but also respond to unforeseen changes in the future. As importantly, the LPT promotes the interests of the public, owners retaining title to property after neighbors

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<sup>157</sup> Greenberg, *supra* note 116 (noting that the developer had a “stalemate” to force the city to seek title after deals could not be reached with five of sixty-nine owners).

<sup>158</sup> Tina Cassidy & Don Aucoin, *Harvard Reveals Secret Purchases of 52 Acres Worth \$88m in Allston*, BOS. GLOBE, June 10, 1997, at A1.

<sup>159</sup> Tracy Jan, *Harvard Slows Work on Allston Complex*, BOS. GLOBE, Feb. 19, 2009, at A1. Harvard’s endowment was projected to decrease by 30%. *Id.* (A member of the Harvard Allston Task Force continued by stating that “[y]ou can suck it up and take it when you think it’ll be a couple more years and all the watercolor drawings and pretty pictures will come true. But now this is what I may be looking at for the rest of my life.”).

<sup>160</sup> Tracy Jan, *Dread Is Rising in Harvard’s Hole as Work Slows, Acres of Blight Worry Allston*, BOS. GLOBE, Feb. 23, 2009, at B1.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

voluntarily sell their properties, and land assemblers. Although the LPT cannot be implemented without increased cost to the land assembler and condemning authority, the increased cost not only promotes better planning practices, but also prompts land assemblers to engage in pre-litigation negotiations with greater urgency to save those costs.

### *A. A Skeleton of the LPT: Purpose, Parties, and Powers*

According to Austin W. Scott, author of one of the most influential treatises on trusts, a trust can be used for purposes “as unlimited as the imagination of lawyers.”<sup>163</sup> To that end, a brief survey of the types of trusts confirms that trust law recognizes a broad array of trust purposes. The purposes of private trusts range from permitting a decedent spouse to defer estate taxes on qualifying property held in trust until the death of a surviving spouse (the ingeniously titled QTIP trust) to shielding an individual’s assets from creditors using an asset protection trust (an APT trust).<sup>164</sup> Beyond these private purposes, trusts may have commercial purposes and take the form of a business association, such as the real estate investment trust (a REIT).<sup>165</sup> Although some of the trusts have attracted concern and criticism,<sup>166</sup> the variegated purposes for which trusts have been employed demonstrate that lawyers have unquestionably used their imaginations imaginatively.

The purpose of the LPT is to preserve each of the properties within the area targeted for development until both title and possession of all parcels necessary for development are, in fact, acquired by voluntary agreement or eminent domain. In function, the LPT is similar to preservation trusts that have been created on both national and state levels to protect historic buildings or culturally sensitive lands.<sup>167</sup> The National Trust for Historic Preservation, for

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<sup>163</sup> 1 AUSTIN W. SCOTT & WILLIAM F. FRATCHER, *THE LAW OF TRUSTS* § 1, at 2 (4th ed. 1987).

<sup>164</sup> I.R.C. § 2056(b)(7) (2006) (QTIP provision); NEV. REV. STAT. § 166.040(1)(b) (Supp. 2009) (self-settled asset protection trust); UTAH CODE ANN. § 25-6-14 (West 2007) (self-settled asset protection trust).

<sup>165</sup> See, e.g., MD. CODE ANN., CORPS. & ASS’NS § 8-101(b) (Lexis 2002) (defining a REIT to be “an unincorporated business trust or association formed under this title in which property is acquired, held, managed, administered, controlled, invested, or disposed of for the benefit and profit of any person who may become a shareholder”).

<sup>166</sup> Self-settled asset protection trusts have been subjected to critical examination. See, e.g., Robert T. Danforth, *Rethinking the Law of Creditors’ Rights in Trusts*, 53 HASTINGS L.J. 287 (2002); Stewart E. Sterk, *Asset Protection Trusts: Trust Law’s Race to the Bottom?*, 85 CORNELL L. REV. 1035 (2000).

<sup>167</sup> See, e.g., CAL. PRESERVATION FOUND., <http://www.californiapreservation.org/> (last visited Oct. 2, 2011); FLA. TRUST FOR HISTORIC PRESERVATION, <http://www.floridatrust.org/> (last visited Oct. 2, 2011); MARTHA’S VINEYARD PRESERVATION TRUST, <http://www.mvpreservation.org/p.php/preservation/home> (last visited Oct. 2, 2011); NEW HAVEN PRESERVATION TRUST, <http://nhpt.org/> (last visited Oct. 2, 2011); PRESERVATION

example, prevents the destruction or deterioration of properties it holds in trust.<sup>168</sup> Pursuant to its mission, the National Trust for Historic Preservation filed a lawsuit to stop Wal-Mart from building on the Civil War's Wilderness Battlefield and participated in litigation to prevent the opening of roads through Utah's Grand Staircase, which is home to "hundreds of prehistoric sites."<sup>169</sup> The ultimate beneficiary of a preservation trust is the public; many sites protected by preservation trusts would be subject to the wrecking ball without the trusts' protection, which would sever irreplaceable links to history.<sup>170</sup>

Although the fundamental objective of the LPT is similar to the mission of a preservation trust, the LPT is not an exact duplicate of a typical preservation trust. The ultimate goal of many preservation trusts is to protect properties held in trust in perpetuity. The LPT, on the other hand, cannot offer permanent protection for its properties.<sup>171</sup> Perpetual protection for LPT properties would forever freeze them in their present states, which is likely to be inefficient given that the properties are sought for development. Furthermore, the tax benefits afforded many preservation trusts cannot apply to LPT properties. The Federal Rehabilitation Tax Credit discourages demolition of historically important properties by offering tax incentives to restore a "certified historic structure."<sup>172</sup> Reducing or eliminating the tax liability of the properties held by the LPT, however, would harm the community by withholding money that could be used to support community services or projects. The financial straits of the community serve as the stimuli for redevelopment efforts, and reducing tax income only exacerbates the community's financial problems.

After establishing the purpose of a trust, the next step in trust creation is to identify the parties with interests in the trust and place property in the trust.<sup>173</sup> After the land assembler and property owner have reached agreement to transfer title to the property, the land assembler transfers title to the property to the LPT

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TRUST OF VT., <http://www.ptvermont.org/> (last visited Oct. 2, 2011); TENN. PRESERVATION TRUST, <http://www.tennesseepreservationtrust.org/> (last visited Oct. 2, 2011).

<sup>168</sup>NAT'L TRUST FOR HISTORIC PRESERVATION, <http://www.preservationnation.org/about-us/p.php/preservation/home> (last visited Oct. 2, 2011).

<sup>169</sup>Julia Miller, *Spotlight on the National Trust's Legal Defense Fund*, FORUM NEWS (Mar. 2010), <http://www.preservationnation.org/forum/library/public-articles/spotlight-on-the-national.html>.

<sup>170</sup>See, e.g., MARTHA'S VINEYARD PRESERVATION TRUST, <http://www.mvpreservation.org/> (last visited Aug. 8, 2011) (stating that its properties are "threatened by demolition"). For discussion on a trust with a similar purpose, see, for example, James J. Kelly, Jr., *Land Trusts that Conserve Communities*, 59 DEPAUL L. REV. 69 (2010).

<sup>171</sup>See Dwight Young, *What Is the National Register?*, PRESERVATION (May/June 2011), <http://www.preservationnation.org/magazine/2011/may-june/what-is-the-national-register.html>.

<sup>172</sup>I.R.C. § 170(h)(4)(A)(iv) (2006).

<sup>173</sup>The purpose of this section is to outline the basic framework of the LPT and not to identify all provisions that might be necessary for its function; thus, the use of the word "skeleton" in the heading for this portion of the article.

for the benefit of the assembler.<sup>174</sup> If title to all of the necessary properties cannot be secured by voluntary agreement, the condemning authority may exercise its eminent domain power and, if successful, transfer title to the properties it acquires to the LPT. The assembler not only contributes property to the LPT, but also manages the properties as a trustee of the LPT. However, the assembler is not the sole trustee of the LPT—the condemning authority is also designated as a co-trustee of the LPT. As co-trustees, the land assembler and condemning authority possess identical legal interests in LPT properties; therefore, the LPT's legal and equitable interests are not unified in one party to the trust and the LPT does not terminate by merger.<sup>175</sup>

Unlike the absence of an explicit public interest prior to an eminent domain proceeding under the typical land assembly process, the LPT shifts the public interest forward to provide the public with a formal role during the private phase of land assembly. For example, decisions regarding the administration of the trust must be made by unanimous agreement of the co-trustees when a trust consists of two co-trustees.<sup>176</sup> As a result, the condemning authority/co-trustee could withhold consent, thereby prohibiting action by the assembler/co-trustee that might be detrimental to the LPT. Moreover, the condemning authority/co-trustee has the authority to enforce the trust against the assembler/co-trustee; therefore, the condemning authority/co-trustee could file suit against the assembler/co-trustee if the latter's acts violated the purpose of the LPT.<sup>177</sup> Indeed, the financial incentives of the co-trustees compel rational co-trustees to monitor the actions of other co-trustees and enforce the terms of the trust because a co-trustee may be held liable for a breach of trust committed by another co-trustee.<sup>178</sup> Thus, the primary benefit of the LPT's co-trustee arrangement is that the condemning authority, as a representative of the public interest, serves as a check on the self-maximizing tactics of land assemblers during the entirety of the typical land assembly process.

Requiring a land assembler to take title to real property acquired by voluntary transaction as co-trustee of the LPT with the condemning authority may appear to interfere with the freedom of the land assembler to contract for the transfer of title. After all, most purchasers of real property take title in fee

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<sup>174</sup> The LPT could be self-settled or created by statute.

<sup>175</sup> See RESTATEMENT (THIRD) OF TRUSTS § 69 (2003); see also *id.* § 32 cmt. b (“A person who receives both the sole legal title to property and the entire beneficial interest in that property . . . takes the property free of trust because of the doctrine of merger.”); *id.* § 3 cmts. c–d (noting that “[t]he settlor may serve as trustee, as may a beneficiary”; also observing that “[t]he settlor or the trustee, or both, may be beneficiaries”). The sole settlor–co-trustee–sole beneficiary arrangement may appear to be an unusual arrangement upon first blush, but it is not foreign to trust law. See SCOTT & FRATCHER, *supra* note 163, § 99.4, at 65–66 (discussing trusts involving a sole beneficiary and co-trustees, with citations to cases).

<sup>176</sup> The unanimity rule applies here because there are only two co-trustees. If there are more than two co-trustees, the trust may be administered pursuant to a decision by the majority of the co-trustees. See UNIF. TRUST CODE § 703(a), 7C U.L.A. (2000).

<sup>177</sup> RESTATEMENT (THIRD) OF TRUSTS § 81 (2003).

<sup>178</sup> *Id.*



simple and not in trust. However, property law is replete with restrictions on interests voluntarily transferred between bargaining parties. During the latter part of the eighteenth century, states sought to eliminate the fee tail from the pantheon of possessory estates by construing language in deeds that purported to transfer a fee tail to grant a fee simple to the grantee.<sup>179</sup> In states where the fee tail escaped abolition, statutes construe language conveying a fee tail as conveying more acceptable estates, such as a life estate with a remainder in fee simple, regardless of the grantor's intent.<sup>180</sup> At present, statutes like the Fair Housing Act limit the ability of a landlord to discriminate against tenants by placing provisions in leases that have the effect of singling out certain tenants for different treatment.<sup>181</sup> Thus, requiring the assembler to take title to property in advance of eminent domain litigation in trust is not an aberration, but rather consistent with transactional limitations that have long been imposed in other areas of property law.

In addition to establishing the purpose and the parties with interests in the LPT, one of its most important provisions is the language used to identify the duration of the trust. According to the Restatement (Third) of Trusts, a trustee has "only such power to terminate the trust . . . as is granted by the terms of the trust."<sup>182</sup> To account for the possible length of the bifurcated process of land assembly, the trust must remain in existence until all of the property necessary for the project has been acquired either voluntarily by mutual agreement or involuntarily after eminent domain litigation. To define its duration, the LPT could contain a phrase such as:

This trust shall terminate upon the agreement of the co-trustees following the acquisition and occupation of all parcels of land necessary for development regardless of the mechanism of acquisition. At termination, the beneficiary shall take sole legal and equitable title to all properties held in trust.

Delimiting the LPT's duration in this manner accounts for the various ways in which properties might be assembled by pre-litigation negotiation, eminent domain, or a combination of the two. If all properties are acquired voluntarily without litigation, the trust holds all of the properties and terminates upon the acquisition of the last parcel necessary for the project as long as the co-trustees agree to terminate the LPT. The more likely land assembly process involves both voluntary transfers and involuntary acquisition of property by eminent domain. Following successful acquisition by eminent domain, the condemning authority transfers the properties to the trust and the trust may terminate. If, on the other hand, a court rejects the eminent domain petition submitted by the condemning authority, the land assembler or condemning authority could

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<sup>179</sup> 2 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 14.07 (Michael A. Wolf ed., LexisNexis Matthew Bender 2010).

<sup>180</sup> *Id.* § 14.07[2].

<sup>181</sup> See Fair Housing Act, 42 U.S.C. §§ 3601–3604 (2006).

<sup>182</sup> RESTATEMENT (THIRD) OF TRUSTS § 64 (2003).

bargain with holdout owners to obtain title by mutual consent. If the parties reach post-litigation agreements to transfer title, the lands secured by such agreements are added to the LPT to give the LPT title to all of the lands required for development.

Because holdout property owners possess an injunction against acquisition after winning a legal challenge against a condemning authority, the possibility exists that the co-trustees will be unable to reach a post-litigation agreement with a victorious owner for a transfer of title. The LPT, however, does not automatically terminate upon failure to acquire all of the necessary parcels for development following unsuccessful attempts at voluntary acquisition. If post-litigation efforts prove futile, the assembler/co-trustee could redraft development plans to account for the holdout property owners. Because local officials would likely be involved in the planning process, the public interest receives further protection from violations of the LPT. After modifications have been made to the redevelopment proposal, the trust may terminate and the assembler acquires legal and equitable title to all of the property in the LPT.

Rather than redesign the development project, the assembler and condemning authority may, of course, decide to scrap plans after the litigation ends for any number of reasons. The cost of redesigning the proposal around holdout owners might be prohibitively high or the duration of litigation could drain the development of its financial feasibility. Under those circumstances, the co-trustees may opt to terminate the trust.<sup>183</sup> In the alternative, another developer may wish to acquire the properties. If so, the assembler/co-trustee may transfer its interest in the LPT to a subsequent party willing to assume the costs of development. To exit the project, the assembler/co-trustee must not only transfer the trusteeship to a successor co-trustee, but also assign its beneficial interest in the LPT to the successor co-trustee as a successor beneficiary.<sup>184</sup> The new co-trustee subsequently enters into a public-private partnership with the condemning authority to complete the project.

Whether an original or successor co-trustee, a co-trustee possesses a vast array of powers to manage the property held in trust. The majority of powers

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<sup>183</sup> For options at termination, see *infra* Part IV.B.

<sup>184</sup> UNIF. TRUST CODE § 705, 7C U.L.A. (2000), for example, permits a trustee to resign the office provided that notice is given to the trust's beneficiaries and a court approves the successor trustee. The common law, on the other hand, only allows for a change of trustees after a court approval, while the Restatement of Trusts requires that beneficiaries consent to the change. Consent of all beneficiaries should be easily acquired; the condemning authority's interest lies in having the property developed, and it is likely indifferent as to which developer undertakes the task while the trustee is also a beneficiary. Even if court approval is required for a successor trustee to transfer administration of the trust, a court is likely to approve a change because the interests of all of the stakeholders in the trust align and none are impaired by the change. While the condemning authority might have favorite developers for one reason or another, such favoritism may play little to no role in the decision to consent to a change in trustees. The condemning authority is likely the local government, and it faces the prospect of either consenting to the change or the risk of wasting the land. This provides an incentive to consent to the change.

accruing to a trustee are established by default, and the list of default powers is extensive. For example, the Uniform Trust Code contains twenty-six paragraphs enumerating the default powers available to manage a trust, such as the power to mortgage trust property and accept/reject additions of property to the trust.<sup>185</sup> To increase the flexibility with which a trustee may manage the trust, a trustee has broad discretion in exercising default powers.<sup>186</sup> Settlers, however, may curtail the discretion afforded a trustee by modifying the default powers of the trustee by the express terms of the trust.<sup>187</sup> Because a trustee has an affirmative duty to follow directives specified in the trust instrument, the trustee risks liability if the trustee exercises a power expressly barred by the language of the trust instrument.<sup>188</sup>

Among the laundry list of default powers that may be exercised by the trustee as enumerated in Uniform Trust Code section 816 is one that poses a substantial threat to the purpose of the LPT—a trustee possesses the power to “raze existing . . . buildings.”<sup>189</sup> The Uniform Trust Code is not exceptional in its grant of the power to destroy trust property; many state codes grant trustees the power to destroy structures on real property held by the trusts they manage.<sup>190</sup> The LPT’s mission, however, is to prevent destruction of the structures standing on LPT properties at the time of acquisition until the LPT terminates. Consequently, the power to destroy buildings on trust property must be suspended while the trust remains in existence. To withhold the power to destroy the properties held by the LPT from the co-trustees, the LPT could simply contain a clause specifying that no structures in existence at the time of acquisition shall be razed until trust termination.

The power to destroy property is not the only default power that could be wielded by a co-trustee to thwart the purpose of the LPT. A trustee generally has the power to sell trust property unless withheld by the express terms of the trust.<sup>191</sup> In theory, the co-trustees could sell a LPT property, the subsequent title holder could raze structures on the property because the subsequent owner is not subject to terms of the LPT, and then the property could be sold back to the LPT. Indeed, nullifying transactional strictures by use of a straw is old sport within property law. In some states, for example, the use of a straw continues to be an effective tool to evade the four unities (time, title, interest, and

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<sup>185</sup> *Id.* § 816.

<sup>186</sup> *Id.* § 815(a).

<sup>187</sup> John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1105 (2004) (“The law of trusts consists overwhelmingly of default rules that the settlor who creates the trust may alter or negate.”).

<sup>188</sup> RESTATEMENT (THIRD) OF TRUSTS § 72 (2003).

<sup>189</sup> UNIF. TRUST CODE § 816(8).

<sup>190</sup> See, e.g., ARIZ. REV. STAT. ANN. § 14-10816(8) (West 2010); FLA. STAT. ANN. § 736.0816(9) (West 2010); MICH. COMP. LAWS ANN. § 700.7817(h) (West 2010); MISS. CODE ANN. § 91-9-107(h) (West 2010).

<sup>191</sup> UNIF. TRUST CODE § 816(2).

possession) that are required to create a joint tenancy.<sup>192</sup> To avoid the possibility of frustrating the purpose of the LPT prior to trust termination by sale, the trust's language must include a ban on the power of sale unless the trust is to be terminated or the present co-trustee's interest is conveyed to a successor co-trustee.

Withholding the powers to destroy and sell acquired properties bridges the gap of time between the transfer of title and the ability to make a productive use of property during which a change of circumstances might derail the project. In essence, the LPT maintains the status quo of the targeted area until all necessary titles are transferred to the LPT and the co-trustees mutually agree to its termination. Of course, the protection of the LPT lasts only so long as it exists—changing circumstances could thwart a project's completion after the termination of the LPT. Prior to termination, however, the LPT preserves the physical structures on its properties thereby providing greater protection for the public interest than offered by the “acquire and destroy” strategy permitted by the traditional land assembly process.

Applying the foregoing LPT provisions to the pre- and post-litigation circumstances in *Kelo* illuminates how the LPT might be used to preserve properties marked for acquisition. New London's developer acquired title to most of the properties by mutual consent; therefore, those properties would be held in trust by the LPT. Unlike the demolition that occurred prior to the termination of the *Kelo* litigation, the LPT's ban on demolition would shield the structures on LPT properties from the wrecking ball while the litigation progressed. The Court's holding in *Kelo* awarded title to New London; therefore, the co-trustees could agree to terminate the LPT to initiate the construction phase of the redevelopment plan. Under the facts of *Kelo*, however, the condemning authority may have refused to terminate the LPT because of the developer's struggle to secure financing from the outset of the project. In fact, New London had granted several extensions of the right to develop to the developer prior to the *Kelo* litigation and that right to develop expired after the Court's decision.<sup>193</sup> Upon expiration of the right to develop, a successor co-trustee could be sought or the LPT could be terminated. By maintaining the status quo until LPT termination, the LPT yields a result that would have been superior to the field of weeds now occupying the proposed redevelopment site in New London.

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<sup>192</sup> DUKEMINIER ET AL., *supra* note 60, at 325 (the straw is used when one prospective joint tenant already has an interest in the property and wishes to create a joint tenancy in that property with another party).

<sup>193</sup> Katie Nelson, *Conn. Land Taken from Homeowners Still Undeveloped*, SEATTLE TIMES (Sept. 26, 2009, 2:31 AM), [http://seattletimes.nwsources.com/html/nationworld/2009939321\\_apuseminentdomain.html](http://seattletimes.nwsources.com/html/nationworld/2009939321_apuseminentdomain.html).

### B. Internalization and Flexibility

In his *Courses on Equity*, Frederic W. Maitland asserted that “of all the exploits of Equity the largest and the most important is the invention and development of the Trust.”<sup>194</sup> Such high praise derived from the “great elasticity” of the trust.<sup>195</sup> In economic terms, “elasticity” equates to internalizing the costs of managing property for the benefit of another; elasticity and internalization represent two sides of the same coin. Unlike the marriage of legal and equitable interests in a single title holder, a trust separates legal and equitable title among the parties to the trust. This separation of legal and equitable title allows the trust to adapt to changing circumstances as compared to situations where title is unified in one party. A legal life tenant, for example, is generally barred from selling the property subject to the life estate in fee simple.<sup>196</sup> Because the market for life estates is not likely to be wide or deep,<sup>197</sup> the limited ability to transfer the property in a declining real estate market threatens to diminish the value of the future interests in the property. Similarly, the life beneficiary of a trust cannot sell the trust corpus either because the beneficiary only has an equitable interest in the corpus. The trustee, however, is permitted to sell trust property as the holder of legal title to trust property.<sup>198</sup> By selling in a declining real estate market, the trustee reduces the beneficiary’s potential loss; the costs of changing circumstances have been internalized by the trust.

The primary mechanism of trust internalization is the imposition of liability on the trustee for a breach of the duties that accompany the position of trustee. The duty of loyalty, for example, bars a trustee from obtaining a personal benefit from the administration of the trust—the trustee must manage the trust “solely in the interest of the beneficiaries.”<sup>199</sup> Economically, a breach of the duty of loyalty imposes a cost on the beneficiary by diverting a benefit from the beneficiary to the trustee; the cost of the breach is externalized to the beneficiary. This cost is internalized because the duty of loyalty saddles the trustee with personal liability for the loss inflicted upon the beneficiary.<sup>200</sup> Similarly, the duty of prudence holds the trustee personally accountable for a failure to satisfy the prudent investor standard that commands a trustee to

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<sup>194</sup> F. W. MAITLAND, *EQUITY* 23 (1929).

<sup>195</sup> *Id.*

<sup>196</sup> DUKEMINIER ET AL., *supra* note 60, at 215 (noting that such a sale may be permitted by the terms of the instrument creating the interest).

<sup>197</sup> A party can only sell the interest that the party possesses; therefore, a life tenant can only sell a life estate, which gives the buyer an interest measured by the life of the seller. As a result, the buyer’s interest is a life estate *pur autre vie*. *Id.* at 202.

<sup>198</sup> *Id.*

<sup>199</sup> RESTATEMENT (THIRD) OF TRUSTS § 78(1) (2007).

<sup>200</sup> SCOTT & FRATCHER, *supra* note 163, § 205 (describing the various approaches to remedy a trustee’s breach of duty).

decrease the risk of loss by investing in assets with varying risk profiles.<sup>201</sup> Again, the beneficiary suffers no harm as a result of the trustee's failure to diversify the trust portfolio—the costs of the trustee's decisions have been internalized by the trustee. This, of course, does not mean that the beneficiary's interest is immunized against harm under all circumstances or that a trustee acts only out of fear of liability,<sup>202</sup> but threatened internalization promotes trustee compliance with the duties that accompany the position of trustee.

The trustee duty that best promotes the purpose of the LPT is the duty to protect trust property. This duty requires a trustee to guard trust property against loss or damage, make necessary repairs to trust property, and obtain insurance against losses attributable to fire and theft.<sup>203</sup> Even though the LPT bans demolition, the co-trustees might be tempted to let the properties fall into disrepair as a cost-saving measure, thereby imposing a cost upon the public, particularly neighboring property owners. Indeed, dilapidation is often a characteristic of blight that justifies acquisition by eminent domain.<sup>204</sup> Furthermore, letting trust properties fall into disrepair signals remaining property owners to sell with almost as much strength as demolition of the structures on acquired properties.<sup>205</sup> The duty to protect trust property, however, prevents the co-trustees from permitting LPT properties to decay to the detriment of the public; the threat of permissive waste is internalized by the trust.

In combination, restricting the power of the trustee to destroy structures on acquired properties and the duty to protect trust property benefits the public, owners who have yet to sell their properties, and land assemblers. The LPT's ban on destruction until trust termination protects the public interest by reducing the objective externalities associated with post-acquisition destruction over both the short and long term. From a financial perspective, the duty to protect maintains the property tax liability of the acquired properties. Property taxes, of course, are tied to the fair market value of property, and destroying the structures on property in *Kelo*-like settings reduces its fair market value. As a result, an assembler has an incentive to raze buildings on the property to lower its tax liability. The developer in *Norwood* adopted this strategy—destroying homes on acquired properties and then asking tax authorities to reassess the

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<sup>201</sup> RESTATEMENT (THIRD) OF TRUSTS § 77.

<sup>202</sup> The internalization effect is only relevant to situations involving a breach of duty by the trustee. Moreover, this is not intended to suggest that financial incentives are the only incentives that prompt a trustee to comply with the duties imposed upon trustees. For example, a given trustee may feel a moral obligation to comply with trustee duties.

<sup>203</sup> RESTATEMENT (THIRD) OF TRUSTS § 76 cmt. 2(d).

<sup>204</sup> See, e.g., ALA. CODE § 24-2-2(c)(1) (Lexis 2007) (identifying blighted property as property that contains "[t]he presence of structures, buildings, or improvements, which, because of dilapidation, deterioration, or unsanitary or unsafe conditions, vacancy or abandonment, neglect or lack of maintenance, inadequate provision for ventilation, light, air, sanitation, vermin infestation, or lack of necessary facilities and equipment, are unfit for human habitation or occupancy").

<sup>205</sup> Brownfield, *supra* note 85, at 738.

land as empty lots, which would lower the property taxes to be paid on the properties.<sup>206</sup> Under these circumstances, the assembler again seeks an advantage to the detriment of the public—reducing tax revenue is not in the public's interest in communities experiencing economic distress. The LPT's preservation of the physical structures curtails the ability of land assemblers to game the property tax system or permit the properties to deteriorate, which ultimately accrues to the benefit of the public.

Preserving the trust property not only protects the public's wallet, but also benefits the owners who have yet to sell their properties to the assembler. As an initial matter, the market values of neighboring properties are likely to stabilize because the LPT neutralizes the risk of harms associated with vacant lots.<sup>207</sup> Furthermore, the ban on destroying the structures on LPT properties prevents demolition from being used as a leverage to persuade property owners to sell. The impact of the bargaining chip of destruction is blunted; holdout owners are free to bargain without the impact of the negative externality of neighborhood demolition. In economic terms, the terms of the LPT provide remaining owners with a positive externality.

In addition to the LPT's positive effects on the interests of both the public and the owners of property yet to be acquired by the assembler/co-trustee, the LPT also has the potential to benefit its co-trustees if the project is abandoned in the future. The present "acquire and destroy" strategy narrows the future market for the properties because the pre-destruction use is largely foreclosed by destruction. Post-demolition use as a single-family home is not completely foreclosed because single-family homes can be built on empty lots, but such a project would require an injection of capital from a developer. As *Kelo* and *Norwood* show, subsequent developers who want to take on development projects after prior developers fail are not readily available. Preserving the structures on the acquired properties, on the other hand, broadens the sales market if the co-trustees choose to terminate the LPT by putting its properties up for sale. Residential buyers may purchase the homes upon trust termination while developers can purchase the property as well with demolition being the only added cost.<sup>208</sup> Maintaining the structures on the acquired properties thickens what would otherwise be a thinner sales market.

Despite the expansion of the sales market, the LPT has a downside for the land assembler and condemning authority as co-trustees of the LPT. Simply stated, the LPT is likely to increase the cost of land assembly for both the assembler and condemning authority. The combination of the LPT's ban on demolition and the trustee's duty to protect trust property means that the co-trustees will have to finance internal and external maintenance costs for trust

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<sup>206</sup> Gregory Korte, *Norwood Center Argues for Lower Taxes*, CIN. ENQUIRER, Apr. 3, 2006, at 1B (stating that the request would save the developer \$200,000 in property taxes).

<sup>207</sup> Garnett, *supra* note 31, at 955.

<sup>208</sup> The subsequent developer would become a co-trustee of the LPT and seek to terminate the trust.

properties. The cost of maintenance is added to the cost of acquiring title by eminent domain for the condemning authority while that same cost is added to expenditures required to secure title by private agreement for the land assembler. As a result, a possibility exists that the land assembler and condemning authority will collude to lower the financial cost of LPT management. The co-trustees could, for example, cut a secret deal that neither co-trustee will enforce the duty to protect trust property, thereby permitting LPT properties to deteriorate. If neither co-trustee enforces the express terms of the LPT, the LPT's internalization effect vanishes.

The structure of the LPT, however, counteracts the incentive to subvert the purpose of the trust via collusive agreement by linking the financial fortunes of condemning authorities and land assemblers. The present bifurcated land assembly process disproportionately allocates the risk of loss to the public because a land assembler maximizes short-term interests by destroying structures on acquired properties and may ultimately exit the project. After the developer abandons the project, the public continues to bear the long-term costs of failed developmental efforts in the form of stigmatized, vacant lands and the loss of revenue that follows former residents to new locales. The LPT, however, conjoins the time horizons of condemning authorities and land assemblers by connecting each to the project until the LPT terminates. Neither the condemning authority nor the land assembler may be relieved of the legal duty to maintain the trust in the short term, and both parties suffer the consequences of permissive waste in the long term. Presumably, the co-trustees will not want to sell the properties at a loss upon LPT termination or expend money to repair properties to make them saleable. As a result, the mutual investment interests of the parties in the project counsels co-trustees to comply with their duties and the terms of the trust to reduce the risk of loss if the plan for redevelopment disintegrates due to a change in circumstances.<sup>209</sup>

The co-trustees not only have an investment-backed incentive to comply with the terms of the trust and their duties, but may also take measures to offset the costs of compliance. Absent an express prohibition by the terms of the trust, trustees generally have the power to lease property held in trust.<sup>210</sup> Rental payments from tenants of properties held by the LPT may be used to defray the

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<sup>209</sup> The structure of the LPT cannot eliminate the risk of collusion. If the co-trustees collude, the assembler as beneficiary will not file suit to enforce the terms of the trust. Under those circumstances, an analogy may be made to the broadening scope of the rules that govern standing to enforce charitable trusts. Traditionally, an attorney general is the only party with standing to enforce the terms of a charitable trust. However, recent proposals seek to increase the number of parties available to file suit against the trustee for breach of trust. For example, UNIF. TRUST CODE § 405(c), 7C U.L.A. (2000) provides that "[t]he settlor of a charitable trust, among others, may maintain a proceeding to enforce the trust." The public is the unstated beneficiary of the LPT in a manner that is similar to the way in which the public benefits from charitable trusts. As a result, an argument may be made to permit "others" to enforce the trust.

<sup>210</sup> See *id.* § 816(9).



costs of maintenance for unoccupied properties and the property taxes due on all properties held by the trust. Prospective tenants, of course, may hesitate to rent a home on property with the knowledge that the property is presently designated for development; the market of willing and able tenants might be thin. *Kelo*, however, provides evidence that tenants can be found to lease properties subject to acquisition by eminent domain in the near future.<sup>211</sup> Surprisingly, many of Fort Trumbull's residents at the time of the Supreme Court decision were tenants who took up residence after the property owners *lost* their challenge to New London's exercise of eminent domain in the Connecticut Supreme Court.<sup>212</sup> A thin market of potential tenants does not mean that the market is nonexistent.

One group of individuals that might be interested in leasing the property consists of the former owners of those properties. Former owners may be interested in leasing the property for some period of time after selling the property to obtain more time to locate a new home or business site. Leases between the former owners and the LPT could be structured to end upon termination of the LPT or at some mutually agreeable time prior to that point.<sup>213</sup> Furthermore, the leases could include an option for former owners-now-tenants to purchase properties upon termination of the LPT. Whatever the terms, the leases could be finalized at the time of sale and incorporated by reference into the land sale contracts. By leasing the properties, the former owner-now-tenant saves money on property taxes that would otherwise have to be paid if the tenant had fee simple to the property. For its part, the LPT saves money that would need to be expended to maintain the property's physical structures and prevent the vandalism that often accompanies empty structures. While many former owners will not choose to remain in their former homes, the power to lease trust property reflects the flexibility of the LPT and provides both former owners and land assemblers with financial benefits if they opt to enter into a post-title transfer lease.

Although the LPT will undoubtedly increase the cost of land assembly for land assemblers and condemning authorities, increasing mandatory expenditures provides local authorities with an incentive to recalibrate their planning practices. At present, the availability of funding from sources other than local taxpayers, chiefly federal and state funding, skews the cost-benefit analysis in favor of exercising eminent domain in conjunction with

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<sup>211</sup> See Brooks & Busch, *supra* note 90, at 21–22; see also Avi Salzman, *Homeowners Settle, but Their Fighting Spirit Lives On*, N.Y. TIMES, July 9, 2006, at N5 (reporting that an individual moved from Las Vegas to New London to support the homeowners “by paying rent”).

<sup>212</sup> See Brooks & Busch, *supra* note 90, at 21–22.

<sup>213</sup> For example, the former owners and the assembler-co-trustee could enter into a tenancy at will, which has no fixed duration and lasts only so long as both parties intend to remain parties to the lease.

redevelopment projects.<sup>214</sup> For example, federal funds played an instrumental role in advancing GM's project in Poletown and "[w]ithout state funds, NLDC [New London Development Corporation] would not have had any means of financing the Fort Trumbull revival effort."<sup>215</sup> In *Norwood*, the private land assembler agreed to reimburse the costs of land assembly incurred by the condemning authority,<sup>216</sup> which similarly distorts the financial costs of redevelopment. The availability of funding from sources outside the local tax base permits local authorities to make redevelopment decisions divorced from financial constraints associated with local funding of projects; redevelopment decision making is a gamble with what, in essence, is house money.

By contrast, the LPT's duty to protect trust property increases the financial investment in the success of the project from the earliest planning stages. A greater degree of financial accountability will be visited upon the condemning authority and land assembler as co-trustees of the LPT; therefore, they may be forced to place greater reliance on local financing for the project to progress. As evidence of the impact of a change in funding source, local authorities that rely on localized financing tools, such as tax increment financing, do not readily employ the "acquire and destroy" strategy because the risk of reducing property tax revenue exceeds the benefit of immediate destruction.<sup>217</sup> Even if federal and state funding could be used to defray LPT costs, the amount required at the outset would be ambiguous because the duration of the land assembly process is speculative. As a result, local authorities and land assemblers would be forced to marshal acquisition funds carefully to avoid running out of money, which might compel the usage of local revenue streams. The LPT exchanges house money for the local government's money in the redevelopment gamble, thereby increasing fiscal accountability.

As a corollary to the impetus for improved planning spurred by local funding sources, the cost of the LPT offers a partial correction to the incentive to overuse eminent domain to assemble land.<sup>218</sup> The fair market value standard of "just compensation" often falls short of full indemnification for a property owner's loss because it discounts subjective value of the property.<sup>219</sup>

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<sup>214</sup> William A. Fischel, *The Political Economy of Public Use in Poletown: How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 MICH. ST. L. REV. 929, 943-44.

<sup>215</sup> Lefcoe, *supra* note 88, at 940.

<sup>216</sup> *Norwood v. Horney*, 830 N.E.2d 381, 386 (Ohio Ct. App. 2005).

<sup>217</sup> Lefcoe, *supra* note 88, at 940.

<sup>218</sup> The correction is described as "partial" because LPT costs associated with the duration of land assembly may or may not equal the subjective value attached to the property by an owner that is uncompensated under the present fair market value standard.

<sup>219</sup> See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 83 (1985). Others have noted the compensatory shortfall. See, e.g., Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 958 (subjective losses represent an "uncompensated increment" of damages associated with eminent domain); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967) (labeling subjective losses as "demoralization costs").

Consequently, the fair market value standard allows a condemning authority to save money that it would otherwise have to spend to acquire title if the property was on the open market and funnel those savings into the compulsory purchase of other lands. The condemning authority in *Kelo*, for example, sought and acquired title to one of the parcels at issue in the case even though it did not have a clearly defined plan to use the parcel for the immediate construction of the development.<sup>220</sup> The financial outlay to support the purpose of the LPT, however, is a disincentive to acquire more property than needed because doing so only results in an increase in costs prior to breaking ground for the project. The surplus generated by the under-compensation associated with a fair market value standard of “just compensation” is likely to be used to comply with the duties imposed on co-trustees of the LPT; therefore, less funding is available to over-consume land.

The increased costs of the LPT have one additional, and maybe the most important, salutary effect on the traditional land assembly process: combating the risk to the public interest created by postponing productive use of property until some point after title acquisition. Because the duration of the land assembly process is unknown, a land assembler has an incentive to bargain more aggressively for title to property in advance of litigation as a cost-saving measure. To that end, a rational land assembler will increase the offers to owners of desired properties. As a result, the land assembler may aggregate title to necessary parcels in a shorter period of time and litigation, if needed, may commence sooner rather than later as a property owner holds out or a land assembler holds in. In either case, bargaining more aggressively and with greater dispatch shortens the life of the LPT, which diminishes the window during which changed circumstances may obstruct development. In sum, the increased costs of the LPT create a positive feedback loop that promotes voluntary transfers of title while preserving the structures on acquired properties—both of which benefit the public interest.

## V. CONCLUSION

Much of the post-*Kelo* clamor focused on the utility of *Kelo*-style takings from a policy perspective.<sup>221</sup> Because it is a procedural modification to the process of land assembly, the LPT does not directly address the meta-utility of *Kelo*-style takings. However, the LPT may serve as an indirect, albeit imperfect, proxy for the social utility of the project for which the land is being assembled under certain circumstances.<sup>222</sup> If the project is abandoned and no developer can be enlisted to succeed to the position of co-trustee of the LPT, the probability

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<sup>220</sup> *Kelo v. City of New London*, 545 U.S. 469, 495 (2005) (O’Connor, J., dissenting).

<sup>221</sup> See, e.g., Robert G. Dreher & John D. Echeverria, *Kelo’s Unanswered Questions: The Policy Debate Over the Use of Eminent Domain for Economic Development* (2006), [http://www.law.georgetown.edu/gelpi/current\\_research/documents/GELPIReport\\_Kelo.pdf](http://www.law.georgetown.edu/gelpi/current_research/documents/GELPIReport_Kelo.pdf).

<sup>222</sup> The proxy is imperfect because construction might begin but the project might ultimately turn out to be an economic failure.

that the land assembler and condemning authority overestimated the development potential of the site is high. Rather than incur the costs of overestimation in the form of a barren field, the LPT preserves the property for its pre-assembly usage. In the absence of a developer with a viable proposal for development, the pre-assembly usage of the properties preserved by the LPT best reflects the present social utility of those properties.

Ultimately, no mechanism of land assembly can prevent *Kelo*-style failings under all circumstances. The process of land assembly will forever be susceptible to unforeseen changes that threaten the prospects of development after all of the necessary properties have been assembled. Nevertheless, the private and statutory preference for voluntary transfers of title prior to eminent domain generates risks that can be combined to a greater degree than is offered under current law or other scholarly proposals. Indeed, the vacant lots in New London and Norwood attest to the failure to protect the public interest in the process of assembling land for redevelopment. But unlike the present bifurcated process that relegates the public interest to the end of the assembly process, the LPT protects the public interest throughout the duration of land assembly. The LPT injects more of the “public” into the public-private partnership model of land assembly; the scales of land assembly tilt away from the “private” end of the land assembly scale to a position closer to equipoise.